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In The

Supreme Court of the United States

CYNTHIA BRZAK, et al.,

Petitioners,

v.

THE UNITED NATIONS, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The General Convention on the Privileges and Immunities of the United Nations (the "Convention"), the International Organizations Immunities Act ("IOIA"), and the Diplomatic Relations Act ("DRA") provide the United Nations and its officials with a species of immunity from federal and state laws.

1. Whether the Second Circuit mistakenly interpreted the Convention, IOIA and DRA to extend this immunity to cover actions taken by an international organization or its officials outside the scope of their official functions.

2. If not, whether extending that sweeping immunity to private actors such as the respondents would exceed Congress' power under the Constitution or would violate petitioners' rights under the First, Fifth, or Fourteenth Amendments.

PARTIES TO THE PROCEEDINGS

The Petitioners are Cynthia Brzak and Nasr Ishak. Respondents are the United Nations, Kofi Annan, Ruud Lubbers, and Wendy Chamberlin.

The following parties were named as defendants in the District Court but were not parties to the proceedings in the Court of Appeals: Werner Blatter, Kofi Asomani, Raymond Hall, A.-W. Bijleveld, and Daisy Buruku.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE WRIT	7
I. THE SECOND CIRCUIT'S DECISION CONFUSES SOVEREIGN IMMUNITY WITH LESSER FORMS OF STATUTORY IMMUNITY	7
II. THE GROWING PRESENCE OF INTERNATIONAL ORGANIZATIONS WITHIN THE TERRITORIAL UNITED STATES MAKES THE QUESTION WHETHER THEIR STAFF IS ABOVE THE LAW AN ISSUE OF OVERRIDING NATIONAL SIGNIFICANCE	15
III. THE SECOND CIRCUIT'S DECISION THREATENS SIGNIFICANT ADVERSE CONSEQUENCES	19
IV. THIS CASE PRESENTS A COMPELLING VEHICLE TO RESOLVE AN IMPORTANT QUESTION ON THE CONSTITUTIONAL RIGHT OF THE ACCESS TO COURT	22

TABLE OF CONTENTS – Continued

Page

V. THE SECOND CIRCUIT'S DECISION UNDERMINES PETITIONERS' CONSTITUTIONAL RIGHTS 24

a. Petitioners were denied procedural due process 25

b. Petitioners were denied substantive due process 26

c. The petitioners' rights under the First Amendment to petition the Government for redress of grievances have been denied 31

VI. THIS CASE PRESENTS A COMPELLING VEHICLE TO RESOLVE IMPORTANT QUESTIONS CONCERNING THE SCOPE OF THE CONVENTION, THE IOIA, AND THE DRA 32

CONCLUSION 34

APPENDIX

OPINION OF THE U.S. COURT OF APPEALS FOR THE 2ND CIRCUIT, FILED MARCH 2, 2010 ..... App. 1

ORDER FROM THE U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED APRIL 29, 2008 ..... App. 14

U.S. DEPARTMENT OF STATE PROTOCOL STAFFING STATISTICS, DATED MARCH 15, 1996 ..... App. 31

TABLE OF CONTENTS – Continued

Page

INVESTIGATION REPORT ON MISCONDUCT AND ABUSE OF AUTHORITY AT UNHCR – UNITED NATIONS OFFICE OF INTERNAL OVERSIGHT SERVICES, DATED JUNE 2, 2004 ..... App. 32

TABLE OF AUTHORITIES

Page

CASES:

Armstrong v. Manzo, 380 U.S. 552, 85 S. Ct. 1187 (1965) 12

Barr v. Matteo, 360 U.S. 564, 79 S. Ct. 1335 (1971) 9, 10

Battaglia v. General Motors Corp., 169 F.2d 254 (1948) 12

Bill Johnson's Rests., Inc. v. NLRB, 461 U.S. 731, 103 S. Ct. 2161, 76 L.Ed.2d 277 (1983) 30

Board of Regents v. Roth, 408 U.S. 564, 92 S. Ct. 2701 (1972) 14

Boddie v. Connecticut, 401 U.S. 371, 91 S. Ct. 780 (1971) 32

Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 106 S. Ct. 2133 (1986) 13

California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 92 S. Ct. 609, 30 L.Ed.2d 642 (1972) 30

Chambers v. Balt. & Ohio R.R., 207 U.S. 142, 28 S. Ct. 34 (1907) 31

Christopher v. Harbury, 536 U.S. 403 (2002) 22, 23, 24, 30

County of Westchester v. Ranollo, 67 N.Y.S. 2d 31, 187 Misc. 777 (1946) 16, 17

Dostal v. Haig, 652 F.2d 173 (1981) 9

Duke Power v. Carolina Env. Study Group, 438 U.S. 59, 98 S. Ct. 2620 (1978) 11, 26

TABLE OF AUTHORITIES - Continued

Page

Dunhill of London Inc. v. Cuba, 425 U.S. 682 (1976) 16

Graham & Foster v. Goodcell, 282 U.S. 409, 51 S. Ct. 186 (1931) 10

Griffin v. Wilcox, 21 Ind. 370 (1863) 29

Griswold v. Connecticut, 381 U.S. 479 (1965) 28

Forrester v. White, 484 U.S. 219, 108 S. Ct. 538 (1988) 19

Harlow v. Fitzgerald, 457 U.S. 800, 102 S. Ct. 2727 (1982) 19

Ingraham v. Wright, 430 U.S. 651 (1977) 13

Johnson v. Robison, 415 U.S. 361, 94 S. Ct. 1160 (1974) 13

Lockerty v. Phillips, 319 U.S. 182, 63 S. Ct. 1019 (1943) 21

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) 13

Marbury v. Madison, 1 U.S. 137 (1785) 26, 27

Milligan v. Hovey, 17 F.Cas. 380 (No. 9,605) (CC Ind. 1871) 29

Mine Workers v. Illinois State Bar Association, 389 U.S. 217, 88 S. Ct. 353 (1967) 31

Mondou v. New York, NH & HR Co., 223 U.S. 1, 32 S. Ct. 169 (1912) 11

Monsky v. Moraghan, 127 F.3d 243 (2d Cir. 1997) 30

TABLE OF AUTHORITIES – Continued

Page

Moore v. City of East Cleveland, 431 U.S. 494 (1977) 28

Mpiliris v. Hellenic Lines, Ltd., 323 F.Supp. 865, (S.D.Tex. 1969), *aff'd*, 440 F.2d 1163 (5th Cir. 1971) 7

Mullane v. Central Hanover Tr. Co., 339 U.S. 306, 70 S. Ct. 652 (1950) 12

NAACP v. Button, 371 U.S. 415, 83 S. Ct. 328 (1963) 31

New York C. R.R. Co. v. White, 243 U.S. 188, 37 S. Ct. 247 (1917) 26

Nixon v. Fitzgerald, 457 U.S. 731, 102 S. Ct. 2690 (1982) 20

People of New York v. Coumatos, 32 Misc. 2d 1085, 224 N.Y.S. 2d 507 (1962) 16

Reid v. Covert, 354 U.S. 1 (1957) 24, 25

Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989) 21

Societe Internationale v. Rogers, 357 U.S. 197, 78 S. Ct. 1087 (1958) 25

Southway v. Central Bank of Nigeria, 198 F.3d 1210 (1999) 21

Tennessee v. Lane, 541 U.S. 509 (2004) 28

Tenney v. Brandhove, 341 U.S. 367, 71 S. Ct. 783 (1951) 9, 10

Thomas v. Collins, 323 U.S. 516, 65 S. Ct. 315 (1945) 31

TABLE OF AUTHORITIES – Continued

Page

United States v. Coplon, 84 F.Supp. 472 (S.D.N.Y. 1949) (*Coplon I*) 7

United States v. Egorov, 222 F.Supp. 106 (E.D.N.Y. 1963).....7

United States v. Melekh, 190 F.Supp. 67 (S.D.N.Y. 1960).....7

Zablocki v. Redhail, 434 U.S. 374 (1978).....27

STATUTES:

5 U.S.C. § 7101 30

18 U.S.C. § 1964 .....6, 20, 21

22 U.S.C. §§ 254a-254e.....*passim*

22 U.S.C. § 288[a-e] .....*passim*

28 U.S.C. § 451 1

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1346(b) 29

28 U.S.C. § 1605 .....8, 21

28 U.S.C. § 2403(a) 1

42 U.S.C. § 1983 21

42 U.S.C. § 2000e.....6

TABLE OF AUTHORITIES – Continued

Page

U.S. CONSTITUTIONAL PROVISIONS:

Const. art. I, § 8, cl. 18 7

Const. art. IV, § 2 30

Const. art. VI 24, 25

U.S. Const. amend. I 4, 26, 30, 31, 32

U.S. Const. amend. V .....*passim*

U.S. Const. amend. XIV 4, 13, 26, 31

TREATIES:

Charter of the United Nations, June 26, 1945, 59 Stat. 1031 (1945), ratified August 8, 1945 7

21 U.S.T. 1418.....2

23 U.S.T. 3227.....23, 32, 33

RESTATEMENTS:

ALI, Restatement (Second) Foreign Relations Law of the United States, 69 (1965).....16

OTHER AUTHORITIES:

Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1427, 1489-90 (1987).....18

Edwin M. Smith, *Annual Meeting Panel: The Status of Women in the UN Organization*, International Organization Newsletter (AM. SOC. INT'L L., Wash. DC), 1995 No. 1, at 1-2.....28

TABLE OF AUTHORITIES – Continued

Page

Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1, 50-51 (1972) 29

ERWIN CHEMERINSKY, *Against Sovereign Immunity*, 53 STANFORD L. REV. 1201 (2001) 18

Hilary Charlesworth, *Alienating Oscar? Feminist Analysis of International Law in Reconceiving Reality: Women and International Law* 1, 6 (1993) 28

Guilty Verdict Handed Down in "Secret" UN Sexual Harassment Hearing, Human Rights Tribune, March/April 1994 29

Joan E. Donoghue, *Taking the "Sovereign" Out of the Foreign Sovereign Immunities Act: A Functional Approach to the Commercial Activity Exception*, 17 YALE J. INT'L L. 489, 496-97 (1992) 8

Ling, A Comparative Study of the Privileges and Immunities of United Nations Member Representatives and Officials with the Traditional Privileges and Immunities of Diplomatic Agents, 33 WASH. & LEE L. REV. 91 (1976) 7, 8

Vicky C. Jackson, *Suing the Federal Government: Sovereignty, Immunity and Judicial Independence*, 35 GEO. WASH. INT'L L. REV. 521, 521-23 (2003) 18

Cynthia Brzak and Nasr Ishak respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The matter was initially filed in this Court as a request for leave to file as an original action (No. 136), and was dismissed by this Court without opinion (Order List: 549 U.S., 2006); a mirror complaint was simultaneously filed in the U.S. Federal Court for the Southern District of New York. The opinion of the court of appeals is reported at 597 F.3d 107 (2nd Cir. 2010) and reprinted in the Appendix at App. 14. The opinion of the district court is reported at 551 F.Supp.2d 313 (S.D.N.Y. 2008) and reprinted in the Appendix at App. 1.

JURISDICTION

The court of appeals entered its judgment on 2 March 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Since the proceeding draws into question the constitutionality of a federal statute, it is noted that 28 U.S.C. § 2403(a) (2010) may be applicable. No court of the United States as defined by 28 U.S.C. § 451 has yet notified the Attorney General.

STATUTORY PROVISIONS INVOLVED

This petition involves the application of the General Convention on the Privileges and Immunities of the United Nations (21 U.S.T. 1418),[1] the

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[1] SECTION 2. The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution.

SECTION 18. Officials of the United Nations shall:

(a) be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity;

(b) be exempt from taxation on the salaries and emoluments paid to them by the United Nations;

(c) be immune from national service obligations;

(d) be immune, together with their spouses and relatives dependent on them, from immigration restrictions and alien registration;

(e) be accorded the same privileges in respect of exchange facilities as are accorded to the officials of comparable ranks forming part of diplomatic missions to the Government concerned;

(f) be given, together with their spouses and relatives dependent on them, the same repatriation facilities in time of international crisis as diplomatic envoys;

(g) have the right to import free of duty their furniture and effects at the time of first taking up their post in the country in question.

SECTION 19. In addition to the immunities and privileges specified in Section 18, the Secretary-General and all Assistant Secretaries-General shall

(Continued on following page)

International Organizations Immunities Act ("IOIA") (22 U.S.C. § 288[a-e]),[2] and the Diplomatic Relations

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be accorded in respect of themselves, their spouses and minor children, the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, an accordance with international law.

[2] *§ 288a. Privileges, exemptions, and immunities of international organizations*

International organizations shall enjoy the status, immunities, exemptions, and privileges set forth in this section, as follows:

(a) International organizations shall, to the extent consistent with the instrument creating them, possess the capacity –

(i) to contract;

(ii) to acquire and dispose of real and personal property;

(iii) to institute legal proceedings.

(b) International organizations, their property and their assets, wherever located, and by whomsoever held, shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments, except to the extent that such organizations may expressly waive their immunity for the purpose of any proceedings or by the terms of any contract.

§ 288d. Privileges, exemptions, and immunities of officers, employees, and their families; waiver

(a) Persons designated by foreign governments to serve as their representatives in or to international organizations and the officers and employees of such organizations, and members of the immediate families of such representatives, officers, and employees residing with them, other than nationals of the United States, shall, insofar as concerns laws regulating entry into and departure from the United States, alien registration and fingerprinting, and the registration of foreign agents, be entitled to the same privileges,

(Continued on following page)

Act ("DRA") (22 U.S.C. §§ 254a-54e)[3] to dismiss the petitioners' complaint for want of subject matter jurisdiction, the petitioners assert that such application violated their rights pursuant to the First, Fifth and Fourteenth Amendments to the U.S. Constitution.

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exemptions, and immunities as are accorded under similar circumstances to officers and employees, respectively, of foreign governments, and members of their families.

(b) Representatives of foreign governments in or to international organizations and officers and employees of such organizations shall be immune from suit and legal process relating to acts performed by them in their official capacity and falling within their functions as such representatives, officers, or employees except insofar as such immunity may be waived by the foreign government or international organization concerned.

[3] *§ 254d:*

Any action or proceeding brought against an individual who is entitled to immunity with respect to such action or proceeding under the Vienna Convention on Diplomatic Relations, under section 254b or 254c of this title, or under any other laws extending diplomatic privileges and immunities, shall be dismissed.

Such immunity may be established upon motion or suggestion by or on behalf of the individual, or as otherwise permitted by law or applicable rules of procedure.

STATEMENT OF THE CASE

On or about 18 December 2003, respondent Lubbers, while then UN High Commissioner for Refugees, indecently assaulted petitioner Ms. Brzak, in his executive offices, in an outrageous and inappropriate manner. Petitioner Brzak filed an internal complaint with the UN's Office of Internal Oversight Services ("OIOS"), which conducted an investigation into the complaint, and ultimately reported to respondent Annan, then the UN Secretary General, that it had confirmed the truth of Ms. Brzak's complaint against Lubbers, and recommended that appropriate disciplinary sanctions be applied to Mr. Lubbers (App. 58).

Retaliation against Brzak began almost immediately after Mr. Lubbers was informed of her complaint, and this retaliation was the subject of two further official complaints by her to OIOS in June and September 2004. In July 2004, Mr. Annan ignored the clear and unequivocal findings of the June OIOS report, and instead purported to publicly exonerate Mr. Lubbers. The respondents continued to retaliate against petitioner Brzak for her actions in bringing complaints against Mr. Lubbers' actions, and also retaliated against petitioner Ishak, a fellow UNHCR staff member, for assisting her in pursuing her complaints.

On or about 28 October 2005, the petitioner Brzak filed a complaint with the New York EEOC office against the respondents claiming that she had

been indecently assaulted and had been retaliated against on account of her reporting of such assault, as to amount to actionable sexual harassment under Title VII of the Civil Rights Act of 1964 (EEOC Charge No. 160-2006-01029)). On or about 31 January 2006, the EEOC issued to the petitioner Brzak a letter of Dismissal and Notice of Rights claiming simply, without explanation or support, that the EEOC "had no jurisdiction".

On or about 4 May 2006, the petitioners filed a Complaint in the Southern District of New York against the respondents asserting a number of common law claims that existed at the time of the adoption of the U.S. Constitution (battery, breach of contract/constructive termination, intentional infliction of emotional distress) as well as several claims created more recently by Congressional action (retaliation for asserting a right under Title VII of the Civil Rights Act of 1964, and racketeering and conspiracy claims under Civil RICO).

By letter dated 2 October 2007, the U.S. Attorney for the Southern District advised the district court of his intention to refrain from appearing in the action on behalf of the defendant United Nations, or to otherwise intervene on its behalf.

REASONS FOR GRANTING THE WRIT

I. THE SECOND CIRCUIT'S DECISION CONFUSES THE IMMUNITY GRANTED TO SOVEREIGN STATES WITH LESSER FORMS OF STATUTORY IMMUNITY.

Employees of the United Nations are separate and distinct from persons designated by foreign governments to serve as their foreign representatives in or to the United Nations. *United States v. Melekh*, 190 F.Supp. 67, 79-80 (S.D.N.Y. 1960); *United States v. Egorov*, 222 F.Supp. 106, 108 (E.D.N.Y. 1963). Accord, *United States v. Coplon*, 84 F.Supp. 472, 474 (S.D.N.Y. 1949) (*Coplon I*). And *see Mpiliris v. Hellenic Lines, Ltd.*, 323 F.Supp. 865, 882-83 (S.D.Tex. 1969), *aff'd*, 440 F.2d 1163 (5th Cir. 1971).

In the U.S., immunity for representatives of the UN is granted only for acts performed by them in their official capacities and falling within their functions as representatives, officers, or employees. *United States v. Melekh*, 190 F.Supp. 67, 79 (S.D.N.Y. 1960). "Measures implementing Article 105 of the United Nations Charter need only pass the constitutional test of being 'necessary and proper', U.S. Const. art. I, § 8, cl. 18, which in turn depends on 'the functional standard set up in the Charter.'" *Id.* at 82. *See also* Ling, *A Comparative Study of the Privileges and Immunities of United Nations Member Representatives and Officials with the Traditional Privileges and Immunities of Diplomatic Agents*, 33 WASH. & LEE L. REV. 91 (1976):

> "The exemptions and immunities of United Nations officials in the United States, as stipulated by the terms of the United Nations Charter and the General Convention, are designed solely to protect the independence of officials in their United Nations functions. No exemption from local jurisdiction is provided officials for acts in their private capacity." (Footnote omitted). *Id.* at 138.

As Ling also points out: "[i]t is the work rather than the official which is protected," with the result that such officials "must obey all ordinary laws governing their private actions." *Id.* at 129.

As absolute foreign sovereign immunity has been repudiated by virtually all other countries, and as judicial scrutiny of the conduct of States has been expanded in both domestic and foreign courts (including in the U.S. with the passage of Foreign Sovereign Immunities Act [28 U.S.C. § 1605 "FSIA"]), it is not obvious why international organizations such as the respondent United Nations should need to be broadly and presumptively exempted from similar review. There is no compelling jurisprudential or policy reason why a collection of states acting through an international organization should require substantially broader immunity than its member states enjoy when they act alone. *See Donoghue*, 17 YALE J. INT'L L. at 498.

The Second Circuit's key error was to conflate the idiosyncratic immunity of international organizations

with the traditional and historical immunity afforded to states and their officials.

This Court has held that Congress may only confer such immunity when it is "well-grounded in history and reason." *Tenney v. Brandhove*, 341 U.S. 367, 376, 71 S. Ct. 783, 788 (1951). Only "official immunities" (legislative, judicial, prosecutorial, and executive) that are "customary and normal" are valid. *Dostal v. Haig*, 652 F.2d 173, 177 (1981). The immunity conferred upon the respondent United Nations and its officials under the General Convention, the IOIA and DRA, are not "well grounded in history and reason," nor are such immunities even properly "official," as the UN is neither a sovereign state nor an arm of any sovereign state. The respondents are not the type of officials customarily afforded immunity.

The official immunity doctrine "has, in large part, been of judicial making," *Barr v. Matteo,* 360 U.S. 564, 569, 571, 79 S. Ct. 1335, 1339 (1971). Immunity is conferred on *Government* officials of suitable rank for the reason that:

> "officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties – suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of

> government." *Id.*, at 571 (quoting Justice Learned Hand).
>
> "[O]n the one hand, the protection of the individual citizen against pecuniary damage caused by oppressive or malicious action on the part of officials of the Federal Government; and on the other, the protection of the public interest by shielding responsible governmental officers against the harassment and inevitable hazards of vindictive or ill-founded damage suits brought on account of action taken in the exercise of their official responsibilities." *Id.* at 565.

While it is well-established that, although Congress may withhold and restrict jurisdiction of courts other than the Supreme Court, it must not so exercise that power as to deprive any person of life, liberty or property without due process of law or take private property without just compensation. *Graham & Foster v. Goodcell,* 282 U.S. 409, 51 S. Ct. 186 (1931). Immunity of government officials (which effectively restricted the jurisdiction of the district court in this case to adjudicate the petitioners' common law and statutory claims) is only appropriately granted when it is well grounded in history and reason. *Tenney v. Brandhove*, 341 U.S. 367, 376, 71 S. Ct. 783, 788 (1951).

The United Nations is not a sovereign state nor an arm or instrument of the United States government, and as the immunities afforded to the

respondents and its officials are not "well grounded in history or reason."

Of course, contrary to the characterization of the Second Circuit, the petitioners do not challenge the constitutionality of true diplomatic immunity, but rather only the immunity afforded to the UN and its officials (as they are neither a sovereign state nor diplomatic envoys of a diplomatic state) that is neither "official" nor firmly rooted in the common law.

While the respondents accept that Congress has the constitutional authority to limit the jurisdictional reach of the lower federal courts (as it has attempted to do in the Convention, the IOIA and the DRA), a number of Supreme Court cases suggest that any attempt by Congress to abolish existing common law or statutory causes of action would be constitutional only if they were replaced with a "reasonably just substitute." *See Duke Power v. Carolina Env. Study Group,* 438 U.S. 59, 93, 98 S. Ct. 2620, 2641 (1978) ("This panoply of remedies and guarantees is at least a reasonably just substitute for the common-law rights replaced by the Price Anderson Act. Nothing more is required by the Due Process Clause"); and *Mondou v. New York, NH & HR Co.*, 223 U.S. 1, 32 S. Ct. 169 (1912) (" . . . it perhaps may be doubted whether the state could abolish all rights of action, on the one hand, or all defenses, on the other, without setting up something adequate in their stead").

In the present case, Congress has failed in either the Convention, the IOIA or the DRA to provide

aggrieved claimants with any reasonably just substitute. The Convention, IOIA and DRA operate as essentially an absolute bar for all claims and all claimants, period, with perhaps the exception of pure state law tort claims. What due process requires is "an *opportunity* . . . granted at a meaningful time and in a meaningful manner," *Armstrong v. Manzo*, 380 U.S. 552, 85 S. Ct. 1187, 1191 (1965), for [a] hearing appropriate to the nature of the case, *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 313, 70 S. Ct. 652, 656 (1950). The petitioners have been denied that opportunity.

This Court has noted that

> the exercise of Congress over its jurisdiction is subject to compliance with at least the requirements of the 5th Amendment. That is to say, while Congress has the undoubted power to give, withhold, and restrict the jurisdiction of the courts other than the Supreme Court, it must not so exercise the power so as to deprive any person of life, liberty, or property without due process of law or to take private property without just compensation.

Battaglia v. General Motors Corp., 169 F.2d 254, 257 (1948). As the Convention, the IOIA and the DRA as applied provide the petitioners with neither any process nor any compensation in absolutely barring any and all claims they might have against the respondent UN and its officials, no matter what the nature and origin of such claims, be they statutorily

created or based in common law, the petitioners believe that their Fifth Amendment rights have been violated.

In depriving the petitioners of any opportunity to adequately present their case, Congress has created "an unjustifiably high risk that [petitioners'] meritorious claims will be terminated" in violation of their fundamental Fifth Amendment rights. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434-35 (1982).

Moreover, where Congress intends to preclude judicial review of constitutional claims its intent to do so must be 'clear and convincing'. *Johnson v. Robison*, 415 U.S. 361, 373-74, 94 S. Ct. 1160, 1169 (1974). Such heightened showing is required to avoid the "serious constitutional question" that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim. *See Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 681, 106 S. Ct. 2133, 2141 (1986). In the present appeal, as the petitioners have asserted a colorable constitutional claim under Title VII (having its origins in the Fifth and Fourteenth Amendments),[4] the Convention, IOIA and the DRA must yield.

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[4] Additionally, the petitioner Brzak asserts that her right to personal security was violated by the assault of respondent Lubbers, and constitutes a "historic liberty interest" protected substantively by the Due Process Clause. *Ingraham v. Wright*, 430 U.S. 651, 673 (1977).

The Second Circuit questionably suggests that there is no limitation on Congress should it wish to abolish any number of constitutional rights. The petitioners simply seek "*some* form of hearing" rather than summarily being deprived of their protected property interests founded in part on their constitutionally protected claims found in Title VII. *Board of Regents v. Roth*, 408 U.S. 564, 570-71, 92 S. Ct. 2701, 2705-06 (1972).

The Second Circuit engages in hyperbole when it asserts that the petitioners challenge the foundation of immunity more broadly. The petition's theory is clearly limited to the non-traditional, *non-governmental* immunities asserted by the United Nations and its officials, which are not well grounded in the history and tradition of the common law. That governmental immunity is well grounded is simply no reason to support giving the same level of immunity to the non-governmental UN and its officials. The Second Circuit should not have blurred together those two questions. The Second Circuit erroneously applied the principles of *sovereign* immunity to these private actors, and the Court should grant certiorari.

II. THE GROWING PRESENCE OF INTERNATIONAL ORGANIZATIONS WITHIN THE TERRITORIAL UNITED STATES MAKES THE QUESTION WHETHER THEIR STAFF IS ABOVE THE LAW AN ISSUE OF OVERRIDING NATIONAL SIGNIFICANCE.

The United Nations and other international organizations employ more than 50,000 staff members in the United States, most of whom are foreign nationals, all of whom enjoy some form of immunity from federal and state laws, some of whom enjoy absolute immunity from such laws as if they were the diplomatic envoys of sovereign states.[5] A New York court, addressing a similar question as those raised in the present petition, opined

> [f]or the Court to recognize the existence of a general and unrestricted immunity over suits and transactions, as proposed by the defendant, would be to establish a large class of people within our borders who would be immune to punishment in as much as the

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[5] *See* the U.S. Dept. of State Protocol Staff Statistics, App. 31, which evidences more than *50,000 persons in the United States* as of 15 March 1996 [the last time the State Department published such statistics] having some form of immunity from U.S. laws on account of their affiliation with the UN or other international organizations, most of whom are presumably foreign nationals. The petitioners' counsel has requested the most recent Staffing Statistics from the U.S. State Dept. through a FOIA request, but have received no response to date, but presume the number of persons enjoying such immunity within the U.S. is substantially greater today than in 1996.

> United Nations has no tribunal for the control and punishment of defendants among its personnel. It can at best expel or eject them from the Headquarters District and such persons would escape trial and punishment completely. Such blanket immunity is contrary to our sense of justice and cannot be supported by any reference to the United Nations Charter, Acts of Congress or executive orders of the President.

People of New York v. Coumatos, 32 Misc. 2d 1085, 1089, 224 N.Y.S. 2d 507, 512 (N.Y. 1962).

That Court had previously held that "[a]ny such theory [of immunity] does violence to and is repugnant to the American sense of fairness and justice and flouts the very basic principle of the United Nations itself, which in the preamble of its Charter affirms that it is created to give substance to the principle that the rights of all men and women are equal." *County of Westchester v. Ranollo*, 67 N.Y.S. 2d 31, 34 187 Misc. 777, 780 (1946).[5] The *Ranollo*

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[5] The petitioners note that granting of absolute immunity for the respondent UN, and as a practical matter, for the individual respondents as well because their alleged tortious acts were within the function of their official employment duties, is contrary to "the prevailing law" in the United States of the "restrictive theory" of sovereign immunity ALI, Restatement (Second) Foreign Relations Law of the United States, 69 (1965). Indeed since 1952, the U.S. Dept. of State has adhered to the position that the commercial and private activities of foreign states do not give rise to immunity (citing the so-called "Tate Letter"). *Dunhill of London, Inc. v. Cuba*, 425 U.S. 682, 698, and

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court recognized the inequity inherent in an overly broad construction of the UN's immunity. The following language from *Ranollo* is particularly noteworthy:

> To recognize the existence of a general and unrestricted immunity from suit or prosecution on the part of the personnel of the United Nations, so long as the individual be performing in his official capacity, even though the individual's function has no relation to the importance or the success of the Organization's deliberations, is carrying the principle of immunity completely out of bounds. To establish such a principle would in effect create a large preferred class within our borders who would be immune to punishment on identical facts for which the average American would be subject to punishment.

Ranollo, 67 N.Y.S. 2d at 34. The question whether Congress really intended to create such a "large preferred class" of individuals that is beyond the

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Appendix 2 thereto (1976). The petitioners assert that the individual respondents' tortious behavior, which in their opinion was neither official or functional (indecent assault, intentional infliction of emotional distress, racketeering and conspiracy), must be ultimately reviewed by the district court after at least some preliminary discovery to see to what degree of immunity, if any, it is entitled (as the 2nd Circuit held in its opinion with regard to the state law battery claim asserted by the petitioner Brzak against the petitioner Lubbers) (App. 12).

reach of United States law even for actions outside of their official duties is of great importance.[7]

Taken to its logical conclusion, the Second Circuit's opinion would lead to the absolute bar of criminal action or resulting civil process even when an international organization official commits or condones rape or murder on U.S. soil.

Because of the large number of persons presently legally residing and working within the territorial United States who are immune from some or all of the state and federal laws of the United States, and because this broad grant of immunity undermines the

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[7] Moreover, it appears that many scholars and other commentators reject the superior doctrine of state sovereign immunity from which the immunities of the respondents upon which the Second Circuit relied to dismiss the complaint. *See* Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1427, 1489-90 (1987) (arguing that immunity from liability "conflicts with the Constitution's structural principle of full remedies for violations of legal rights against government," insisting that it is simply not part of our Constitution's structure); ERWIN CHEMERINSKY, *Against Sovereign Immunity*, 53 STANFORD L. REV. 1201 (2001) (suggesting that "[s]overeign immunity is an anachronistic relic [that] should be eliminated from American law" and that the doctrine "is inconsistent with the U.S. Constitution"); and Vicky C. Jackson, *Suing the Federal Government: Sovereignty, Immunity and Judicial Independence*, 35 GEO. WASH. INT'L L. REV. 521, 521-23 (2003) (arguing that "more restrictive undertakings of sovereign immunity enhance courts' capacities to provide individual justice" and the doctrine's likely incompatibility with the Bill of Rights, and also noting that the federal sovereign immunity is "nowhere explicitly set forth in the Constitution."

fundamental principles upon which our Republic 'of laws and not of men' was founded, certiorari should be granted.

III. THE SECOND CIRCUIT'S DECISION THREATENS SIGNIFICANT ADVERSE CONSEQUENCES.

What official United Nations function would sexual assault, racketeering, intentional infliction of emotional distress and retaliation under Title VII of the Civil Rights Act of 1964 by one of its officials possibly be furthering?

This Court has held that an official seeking absolute immunity bears the burden of showing that such immunity is justified for the function in question. *Forrester v. White,* 484 U.S. 219, 224, 108 S. Ct. 538, 542 (1988), and *Harlow v. Fitzgerald,* 457 U.S. 800, 812, 102 S. Ct. 2727, 2734 (1982). The Court has been "quite sparing" in its recognition of absolute immunity, *Forrester, supra,* and has refused to extend it any "further than its justification would warrant" its functions. *Harlow, supra,* at 811.

In the present case, the indecent sexual assault by respondent Lubbers, and the retaliatory conduct of respondents Annan and Chamberlin against the petitioners, as well as the intentional infliction of emotional distress perpetrated by all of the individual respondents – even though arguably committed on the UN clock – cannot reasonably be deemed to have

been carried out in the course of their functions as UN employees.

Had these respondents been judges, legislators, prosecutors, their actions would not have been shielded from civil or even criminal suit on the basis of official or traditional immunities. *See Nixon v. Fitzgerald,* 457 U.S. 731, 752, 759, 102 S. Ct. 2690, 2702, 2706 (1982) (Burger, C. J., concurring) (noting that "a President, like Members of Congress, judges, prosecutors, or congressional aides – all having absolute immunity are not immune for acts outside official duties"); *see also* 457 U.S. at 761. Clearly, the actions alleged on the part of the individual respondents fall outside even the most liberal definition of "official duties."

Of course, by denying the appeal below, the Second Circuit implicitly confirmed that sexual assault, retaliation in violation of protected conduct pursuant to Title VII, intentional infliction of emotional distress and racketeering under Civil RICO are the "official duties" of the UN Secretary-General, the UN High Commissioner for Refugees and the Deputy High Commissioner for Refugees.[8] Indeed,

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[8] Should this Court conclude in adjudicating this appeal on the merits that the immunities afforded to the United Nations and its officials under the cited authorities are synonymous with or analogous to the immunities afforded to foreign sovereigns and their diplomatic envoys (contrary to the arguments of the petitioners that the United Nations is not a sovereign state and therefore its officials are not diplomatic envoys), then the petitioners would argue that such immunities are solely

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by enforcing the Convention, the IOIA and the DRA, which denied the petitioners' access to the entire U.S. court system, the Second Circuit violated the petitioners' constitutional right of access to courts. *See Lockerty v. Phillips*, 319 U.S. 182, 188, 63 S. Ct. 1019, at 1023 (1943) (observing in dicta that a statutory construction "which would deny all opportunity for judicial determination of an asserted constitutional right is not to be favored").

Without this Court's acceptance on the merits of the current petition, the growing number of UN officials (and officials of other international organizations residing in the U.S. and who enjoy immunity parallel to the respondents) will have a species of immunity that places them uniquely beyond the reach of the rule of law, undermining the fundamental rights afforded by the Constitution.

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governed by the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. § 1605 *et seq.*, as it provides the sole basis for obtaining jurisdiction over a foreign state in federal court. *Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439 (1989). The 10th Circuit Court of Appeals has expressly found that the FSIA confers subject-matter jurisdiction upon the district court over Civil RICO claims against foreign states, their agencies and their instrumentalities, provided that one of the exceptions to immunity apply. *Southway v. Central Bank of Nigeria*, 198 F.3d 1210, 1216 (1999). Such findings by this Court might also give rise to an action pursuant to 42 U.S.C. § 1983.

IV. THIS CASE PRESENTS A COMPELLING VEHICLE TO RESOLVE AN IMPORTANT QUESTION ON THE CONSTITUTIONAL RIGHT OF THE ACCESS TO COURT.

Although accessing courts has been called a fundamental right, this Court's discussion in *Christopher* recognized that the right to access courts is still "unsettled." *Christopher v. Harbury*, 536 U.S. 403, at 415 n.12, 122 S. Ct. at 2186-87 n.12 (2002). The *Christopher* decision refused to reach the issue of access to courts because the Court held that the respondent's complaint failed to adequately state an underlying claim. *Id.* at 418, 122 S. Ct. at 2188. The right to access the courts "is ancillary to the underlying claim, without which a plaintiff cannot have suffered injury by being shut out of court." *Id.* at 415, 122 S. Ct. at 2186-87. The key to the underlying claim is that it "must identify a remedy that may be awarded as recompense but not otherwise available in some suit that may yet be brought." *Id.* at 415, S. Ct. at 2187.

The petitioners have raised well-recognized underlying claims, including but not limited to, sex discrimination and retaliation under Title VII. Moreover, the Second Circuit's opinion in this case did not hold that the petitioners failed to state an underlying claim or that their claims were in any way unclear. Hence, the petitioners have passed the threshold requirement for this Court to opine on their right-to-access argument.

This case provides fertile ground for this Court's guidance on the right to access courts as the Second Circuit's opinion did not provide a meaningful analysis of this claim. The Second Circuit also wrongly reasoned that the right to access courts argument is invalid because it would impinge on all varieties of immunity (such as the traditional government immunities applied to the executive, legislators, the judiciary or prosecutors, none of which concern the immunity afforded to the respondents).

There are two reasons why the Second Circuit's approach requires this Court's guidance. First, the petitioners are not challenging all forms of immunity, only the near-absolute immunity provided to international organizations like the UN under the Convention and the IOIA. Indeed, the Second Circuit did not even reach the merits of the petitioners' constitutional challenge.

Second, the circumstances here are compelling. *Christopher* emphasized the need for the underlying claim to seek redress that is not available in another forum. *Christopher*, 536 U.S. at 415, 122 S. Ct. at 2187. Unlike other forms of immunity, the immunity granted under the Convention and the IOIA, and in the manner applied by the Second Circuit, closes off all avenues of relief for a party in the petitioners' position. Unlike a sovereign nation and its diplomats, the UN, other international organizations, and their officials do not have home countries in which cases can be litigated (as expressly provided for in the Vienna Convention on Diplomatic Relations ("VCDR"),

23 U.S.T. 3227). There is simply no alternative forum. The lower courts in this case have effectively shut off access to any judicial remedy. Because of the clear underlying legal claim asserted by the petitioners and because of the policy considerations at issue, this case provides the ideal forum for this Court to finally resolve the access-to-courts issue that *Christopher* described as being unsettled.

V. THE SECOND CIRCUIT'S DECISION UNDERMINES PETITIONERS' CONSTITUTIONAL RIGHTS.

In *Reid v. Covert*, discussing the treaty power, this Court said:

> "The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our Government. If our foreign commitments become of such nature that the Government can no longer satisfactorily operate within the bounds laid down by the Constitution, that instrument can be amended by the method which it prescribes. But we have no authority, or inclination, to read exceptions into it which are not there."

354 U.S. 1, 14 (1957).

The *Reid* Court found nothing in the Supremacy Clause, nor in the history or debates surrounding its adoption, suggesting that treaties and laws enacted pursuant to them can escape the dictates of the Constitution. *Id.*, at 16. Rather, it concluded, "[i]t would be manifestly contrary to the objectives of those who were responsible for the Bill of Rights – let alone alien to our entire constitutional history and tradition – to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions." *Id.*

A. Petitioners were denied procedural due process.

U.S. courts have traditionally held that the Due Process Clause protects civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances. The property component of the Fifth Amendment imposes a constitutional limitation upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause. *Societe Internationale v. Rogers*, 357 U.S. 197, 209 78 S. Ct. 1087, 1094 (1958).

Although the Court never reached the question, it stated in dicta that it "perhaps may be doubted whether the state could abolish all rights of action, on the one hand, or all defenses, on the other, without setting up something adequate in their stead."

New York C. R.R. Co. v. White, 243 U.S. 188, 201 37 S. Ct. 247, 252 (1917).

Nonetheless, such a requirement may be deduced from the Court's ruling in *Duke Power v. Carolina Env. Study Group*, 438 U.S. 59, 93 98 S. Ct. 2620, 2640 (1978), which, in relying upon the logic of *New York Central*, found that a statute which created a "panoply of remedies and guarantees" was at least a reasonably just substitute for the common-law rights also abolished by the same statute, finding nothing more was required by the Due Process Clause.

The Convention, IOIA and the DRA relied upon by the Second Circuit to dismiss all of the petitioners' claims provide no reasonably just substitute. For that reason, it deprived the petitioners of their constitutionally guaranteed right to procedural due process, in particular, a hearing on the merits of their claims under the First, Fifth and Fourteenth Amendments.

B. Petitioners were denied substantive due process.

A litigant's access to U.S. courts in order to claim the protection of laws is the essence of American civil liberty, and finds its robust origins in *Marbury v. Madison*, 1 U.S. 137, 163-65 (1785):

> "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.

> " . . . The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right. . . ."
>
> "Whatever the practice on particular occasions may be, the theory of this principle will certainly never be maintained. No act of the legislature confers so extraordinary a privilege, nor can it derive countenance from the doctrines of the common law. After stating that personal injury from the king to a subject is presumed to be impossible, Blackstone, Vol. III. p. 255, says, 'but injuries to the rights of property can scarcely be committed by the crown without the intervention of its officers: for whom, the law, in matters of right, entertains no respect or delicacy; but furnishes various methods of detecting the errors and misconduct of those agents by whom the king has been deceived and induced to do a temporary injustice.'"

And the gatekeeper of the civil liberty enshrined in *Marbury* (and indeed a fundamental right on its own) is the thousand year old tradition of access to a meaningful justice system.

The Fifth Amendment contains a substantive as well as a procedural liberty interest in due process, and the liberty interests accorded strongest protection are those found to be fundamental. *Zablocki v. Redhail*, 434 U.S. 374, 386-87 (1978). To determine

whether a liberty interest is fundamental, the Court must examine whether the asserted right is deeply rooted in our history, traditions, and evolving collective conscience such that it is implicit in the Anglo-American concept of ordered liberty. *Griswold v. Connecticut*, 381 U.S. 479, 487 (1965); *Moore v. City of East Cleveland*, 431 U.S. 494, 503-04 (1977).

This Court recently declared the right of access to courts to be fundamental. *Tennessee v. Lane*, 541 U.S. 509, 533-34 (2004).

As such, a restriction on that right requires a "strict scrutiny" analysis, which this immunity fails because it is over-inclusive" and cannot therefore be

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[9] The asserted immunities arguably have the opposite effect to encouraging the good governance of the UN. Sovereign states under current doctrines of jurisdictional immunity are free to brutalize whom they please within their own territory, with little fear of accountability for such impunity. It would be a grave mistake to send the UN and its officials the message that they can now enjoy the same freedom to act with impunity within their own sphere, particularly as some staff will develop an arrogant sense of being above the law. And there is already abundant evidence that the UN has systematically abused its immunities in the employment area to date. *See* Hilary Charlesworth, *Alienating Oscar? Feminist Analysis of International Law in Reconceiving Reality: Women and International Law* 1, 6 (1993) ("[T]he United Nations . . . has an appalling record of discrimination against women staff members."); Edwin M. Smith, *Annual Meeting Panel: The Status of Women in the UN Organization*, International Organization Newsletter (Am. Soc. Int'l L., Wash. DC), 1995 No. 1, at 1-2 (describing a "pattern of overt sexual harassment conducted by male UN Secretariat staff . . . [with] administrative procedures against

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considered narrowly tailored. Moreover, the means employed by the Government to implement its presumed compelling interest in ensuring the proper functioning and independence of international organizations is not the least restrictive means available to the Government. Congress could have easily passed a statute similar to the Federal Tort Claims Act (FTCA, 28 U.S.C. § 1346(b)),[10] or

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such individuals . . . often overturned at higher levels in the Secretariat."); *Guilty Verdict Handed Down in "Secret" UN Sexual Harassment Hearing*, Human Rights Tribune, March/April 1994, at 19-21 (a UN Under Secretary General was compelled to resign for violent sexual harassment of a female UN employee, but was then immediately rehired by the then Secretary General with full benefit of immunity. Only the resulting furor forced his second forced resignation. The victim was threatened with disciplinary action should she violate a gag order imposed by the SG; therefore there is no public information as to the final outcome of the victim's claims against the organization and her harasser.

[10] It does not seem rational to the petitioners that Congress would have intended to grant the Defendant UN or its officials protection from suit or process greater than it has allowed itself, the President, and employees of the Federal Government under the FTCA, nor indeed necessary. If the U.S. Government can function reasonably well under the constraints of the FTCA, the petitioners respectfully submit that such a constraint placed on the respondent UN would no more adversely affect its proper functioning and independence. Furthermore, there appears to be little doubt that even an Act of Congress could not immunize federal officials from suits seeking damages for constitutional violations. *See Milligan v. Hovey*, 17 F.Cas. 380 (No. 9,605) (CC Ind. 1871); *Griffin v. Wilcox*, 21 Ind. 370, 372-73 (1863). *See generally* Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. Colo. L. Rev. 1, 50-51 (1972).

mandated that third party claims or employee suits against the respondent UN be addressed in the Court of Claims or in an *independent,* alternative dispute mechanism that embodies all the due process protections required by the U.S. Constitution, similar to the internal dispute resolution system to which some Federal Government employees are now subjected (and which ultimately allows them access to Federal Court should they not be satisfied with the outcome of the internal dispute resolution mechanism). Civil Service Reform Act, 5 U.S.C. § 7101, *et seq.*

Finally, a litigant's right of access to courts (to be given notice and to be heard) has been otherwise well established. *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 741, 103 S. Ct. 2161, 76 L.Ed.2d 277 (1983) ("[T]he right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances."); *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510, 92 S. Ct. 609, 30 L.Ed.2d 642 (1972) ("The right of access to the courts is indeed but one aspect of the right of petition."); *see also Monsky v. Moraghan,* 127 F.3d 243, 246 (2d Cir. 1997) ("It is well established that all persons enjoy a constitutional right of access to the courts."); *Christopher v. Harbury*, 536 U.S. 403, 415 n.12 (2002) (noting, outside of the context of prisons, the right of access to the courts is guaranteed by an amalgam of the Article IV Privileges and Immunities Clause, the First Amendment Petition Clause, the Fifth Amendment

Due Process Clause, and the Fourteenth Amendment Equal Protection and Due Process Clauses).

C. The petitioners' rights under the First Amendment to petition the Government for redress of grievances have been denied.

The Court has noted "that the rights to assemble peaceably and to petition for a redress of grievances are among the most precious of liberties safeguarded by the Bill of Rights. These rights, moreover, are intimately connected, both in origin and in purpose, with the other First Amendment rights of free speech and free press. 'All these, though not identical, are inseparable.'" *Thomas v. Collins*, 323 U.S. 516, 530, 65 S. Ct. 315, 322-23 (1945), quoting *Mine Workers v. Illinois State Bar Association*, 389 U.S. 217, 222, 88 S. Ct. 353, 356 (1967). It had earlier held that the right to "vigorous advocacy, certainly of lawful ends, against government intrusion," is protected by the First Amendment. *NAACP v. Button*, 371 U.S. 415, 429, 83 S. Ct. 328, 336 (1963). It has also long recognized that "[t]he right to sue and defend in the Courts is the alternative to force. In an organized society, it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship. . . ." *Chambers v. Balt. & Ohio R.R.*, 207 U.S. 142, 148, 28 S. Ct. 34, 35 (1907).

The First Amendment protections described above would however be a hollow promise if the Government could simply prevent their assertion or vindication by immunizing certain non-governmental defendants (such as the respondents) from suit. Without such a legal system that allows litigants such as petitioners herein with valid claims for damages to definitively settle their differences in an orderly and predictable manner pursuant to the rule of law, not only the petitioners herein but society as a whole will be hard pressed to reject what political theorists call the "state of nature." *Boddie v. Connecticut*, 401 U.S. 371, 374, 91 S. Ct. 780, 784 (1971).

In the present case, the Second Circuit's dismissal of the complaint has wrongfully deprived petitioners of their right to petition the Government for a redress of their clear and articulated grievances against the respondents.

VI. THIS CASE PRESENTS A COMPELLING VEHICLE TO RESOLVE IMPORTANT QUESTIONS CONCERNING THE SCOPE OF THE CONVENTION, THE IOIA, AND THE DRA.

The Second Circuit's reliance in its opinion on the Vienna Convention on Diplomatic Relations ("VCDR", 23 U.S.T. 3227), and the Diplomatic Relations Act of 1978 ("DRA", 22 U.S.C. § 254d, which is in fact the executing legislation for the VCDR in the U.S.) as a

basis for dismissing the complaint was misplaced. Neither act expressly confers immunity upon a staff member or official of an international organization. Both limit their scope to diplomatic relations ***between States***, and indeed, the only mention of the United Nations in the VCDR is as the repository of the Treaty, as it is clear that only sovereign states may be parties to the Treaty. "International Organisations" are mentioned once in the VCDR, at Article 5(3) which permits any member of a diplomatic staff of a mission may act as a representative of the sending state to an international organization.

While Section 254(d) of the DRA provides for the dismissal of a suit against an individual who is entitled to immunity as a diplomat under the VCDR, "or under any other laws extending diplomatic privileges and immunities," a sensible reading of the VCDR and its implementing legislation suggests that this level of immunity is limited to sovereign states and their diplomatic agents alone.

As the United Nations is not a sovereign state, and as its officials are not diplomatic agents of any sovereign state, they are not entitled to the protection of either the VCDR or the DRA so as to avoid a claim brought against them for actions beyond the scope of their official functions.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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08-2977-cv
Brzak v. United Nations

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2008

(Argued: May 29, 2009 Decided: March 2, 2010)

Docket No. 08-2799-cv

CYNTHIA BRZAK, NASR ISHAK,

Plaintiffs-Appellants,

— v. —

UNITED NATIONS, KOFI ANNAN,
RUUD LUBBERS, WENDY CHAMBERLIN,

Defendants-Appellees.[*]

Before: LEVAL, POOLER, AND B.D. PARKER, *Circuit Judges*.

Appeal from a judgment of the United States District Court for the Southern District of New York (Sweet, *J.*) dismissing plaintiffs' claims for lack of subject-matter jurisdiction on the grounds that the United Nations is absolutely immune and its former

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[*] The Clerk of Court is directed to amend the official caption to conform to the listing of the parties stated above.

employees who are individual defendants are functionally immune. AFFIRMED.

EDWARD PATRICK FLAHERTY, Schwab, Flaherty & Associes, Geneva, Switzerland, *for Plaintiffs Appellees.*

DONALD FRANCIS DONOVAN, (Catherine M. Amirfar, Semra A. Mesulam, Natalie L. Reid, *on the brief*), Debevoise & Plimpton LLP, New York, New York, *for Defendant-Appellant United Nations.*

Barrington D. Parker, Circuit Judge:

Cynthia Brzak and Nasr Ishak appeal from a judgment of the United States District Court for the Southern District of New York (Sweet, *J.*) dismissing claims against the United Nations and various United Nations officials. The complaint charges defendants with sex discrimination under several federal statutory and state common law theories. The district court dismissed the claims for lack of subject-matter jurisdiction on the grounds that the United Nations and the individual defendants enjoy absolute and functional immunity, respectively. *Brzak v. United Nations,* 551 F. Supp. 2d 313, 318 (S.D.N.Y. 2008); *see* Fed. R. Civ. P. 12(b)(1). On appeal, Brzak and Ishak challenge the findings of immunity and also contend that, if they are correct, the grants of immunity violate the Constitution. We affirm.

BACKGROUND

Except as noted, the facts are not contested. Brzak is an American citizen who worked in Geneva, Switzerland, for the United Nations High Commissioner for Refugees ("UNHCR"). Ishak is a French and Egyptian national who also worked in Geneva for the UNHCR. Defendant Kofi Annan was formerly the Secretary-General for the United Nations, and worked in New York City. Defendant Lubbers was the United Nations High Commissioner for Refugees, and defendant Wendy Chamberlin was a deputy to the Commissioner. Both worked in Geneva. Brzak contends that during the course of a meeting of UNHCR staff members in Geneva in 2003, Lubbers improperly touched her. On the advice of Ishak, Brzak filed a complaint against Lubbers with the United Nations' Office of Internal Oversight Services ("OIOS"). The OIOS issued a report confirming Brzak's complaint and recommending that the United Nations discipline Lubbers. Brzak alleges that Annan disregarded the finding and eventually exonerated Lubbers. Brzak then appealed through the United Nations' internal complaint adjustment process. The plaintiffs allege that, as a consequence of Brzak's complaint, and Ishak's assistance pursuing it, United Nations officials and employees retaliated against them by taking steps such as manipulating Brzak's work assignments and denying Ishak merited promotions.

The plaintiffs sued the United Nations and the individual defendants in the United States District Court for the Southern District of New York, alleging

sex discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.*, and various state common law torts (brought in federal court through supplemental jurisdiction). The United Nations formally returned the complaint to the American ambassador to the United Nations and moved to dismiss on the grounds of immunity, a motion supported by the United States Attorney's Office for the Southern District of New York. *Brzak*, 551 F. Supp. 2d at 316; *see* Letter of United States Attorney for the Southern District of New York, *Brzak v. United Nations*, 06-Civ.-3432 (S.D.N.Y., Oct. 2, 2007). The district court granted the motion. Judge Sweet concluded that the Convention on Privileges and Immunities of the United Nations, Feb. 13, 1946, *entered into force with respect to the United States* Apr. 29, 1970, 21 U.S.T. 1418, (the "CPIUN"), granted the United Nations absolute immunity, which it had not waived, and dismissed the complaint. With regard to the individual defendants, Judge Sweet concluded that the CPIUN granted them the same form of functional immunity former diplomats enjoy under international law. This functional immunity, Judge Sweet held, applied to employment-related suits. *Brzak*, 551 F. Supp. 2d at 318-20. This appeal followed. We review *de novo* a district court's dismissal of a claim for lack of subject-matter jurisdiction. *Flores v. Southern Peru Copper Corp.*, 414 F.3d 233, 241 (2d Cir. 2003). We also review *de novo* legal conclusions which grant or deny immunity. *Aurelius Capital Partners,*

LP v. Republic of Argentina, 584 F.3d 120, 129 (2d Cir. 2009); *Gollomp v. Spitzer*, 568 F.3d 355, 365 (2d Cir. 2009).

DISCUSSION

As the District Court correctly concluded, the United States has ratified the CPIUN which extends absolute immunity to the United Nations. Specifically, the CPIUN provides that "[t]he United Nations . . . shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity." *Id.* art. II, § 2. If the CPIUN applies, then appellants' claims fail. The answer to this question turns on whether the CPIUN is self-executing.

The parties do not dispute that the CPIUN is binding on the United States as a matter of international law. However, they disagree about whether American courts must recognize the immunity it adopts in domestic litigation. *Cf. Medellin v. Texas*, 552 U.S. 491, 504, 506 (2008) (acknowledging that an International Court of Justice opinion is binding on the United States as a matter of international law, while holding that the same opinion lacks domestic legal effect).

Brzak and Ishak contend that the CPIUN should not be enforced by American courts because it is not self-executing, and consequently cannot be enforced absent additional legislation which was never passed. *See Medellin*, 552 U.S. at 505. Whether a treaty is

self-executing depends on whether "the treaty contains stipulations which . . . require no legislation to make them operative;" if so, "they have the force and effect of a legislative enactment." *Id.* at 505-06 (quoting *Whitney v. Robertson*, 124 U.S. 190, 194 (1888)).

In determining whether a treaty is self-executing, we look to the text, the negotiation and drafting history, and the postratification understanding of the signatory nations. *Medellin*, 552 U.S. at 506-07. Additionally, the executive branch's interpretation of a treaty "is entitled to great weight." *Id.* at 513 (quoting *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982)). Based on these criteria, we have little difficulty concluding that the CPIUN is self-executing.

CPIUN Section 34 states "[i]t is understood that, when an instrument of accession is deposited on behalf of any Member, the Member will be in a position under its own law to give effect to the terms of this convention." When the United States acceded to the CPIUN in 1970 (by the President's ratification, with the advice and consent of the Senate), it was affirming that it was "in a position under its own law to give effect" to the CPIUN's terms at that time. This means that the treaty became effective at ratification, and therefore, is self-executing. "[T]he label 'self-executing' usually is applied to any treaty that according to its terms takes effect upon ratification." *Mora v. New York*, 524 F.3d 183, 193 n.16 (2d Cir. 2008) (quoting *United States v. Li*, 206 F.3d 56, 67

(1st Cir. 2000) (en banc) (Selya & Boudin, JJ., concurring)).

The ratification history of the CPIUN reinforces this conclusion. During testimony before the Senate Foreign Relations Committee as it considered whether to recommend that the Senate ratify the CPIUN, the Legal Advisor to the State Department stated that: "It is clear from the language of the convention . . . that the convention is self-executing and no implementing legislation is necessary." S. Exec. Rep. No. 91-17, App. at 16 (Statement of John R. Stevenson, Legal Advisor, Department of State); *see also id.* at 13 ("I would like to have the record reflect[ ] that we regard the convention as self-executing."). The Foreign Relations Committee's report on the CPIUN also expressed the view that "the convention is self-executing and will require no implementing legislation." *Id.* at 5.

Finally, the executive branch continues to assert that the CPIUN is self-executing. *See* Letter of United States Attorney for the Southern District of New York, *Brzak v. United Nations*, 06-Civ.-3432 (S.D.N.Y., Oct. 2, 2007). These views, as we have seen, are entitled to "great weight." *Medellin*, 552 U.S. at 513; *Mora*, 524 F.3d at 204. Consequently, we hold that the CPIUN is self-executing and applies in American courts without implementing legislation.

As the CPIUN makes clear, the United Nations enjoys absolute immunity from suit unless "it has expressly waived its immunity." *Id.* art. II, § 2. Although

the plaintiffs argue that purported inadequacies with the United Nations' internal dispute resolution mechanism indicate a waiver of immunity, crediting this argument would read the word "expressly" out of the CPIUN. The United Nations has not waived its immunity. *See* Letter from Nicolas Michel, United Nations Under-Secretary-General for Legal Affairs, to Alejandro D. Wolff, Deputy Permanent Representative of the United States of America to the United Nations (May 15, 2006); Letter from Nicolas Michel, United Nations Under-Secretary-General for Legal Affairs, to John R. Bolton, Permanent Representative of the United States, to the United Nations (Oct. 19, 2006). Consequently, the United Nations enjoys absolute immunity and the district court's decision to dismiss the claims against the United Nations was correct.

Our conclusion is further confirmed by the International Organizations Immunities Act of 1945, 22 U.S.C. § 288a(b) (the "IOIA"), which provides that international organizations designated by the President should receive the "same immunity from suit and every form of judicial process as is enjoyed by foreign governments." The United Nations has been so designated. *See* Exec. Ord. No. 9698, 11 Fed. Reg. 1809 (Feb. 19, 1946). The plaintiffs argue that designated international organizations no longer have absolute immunity in all cases, because, since that act was passed, Congress has passed the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602-11 ("FSIA"),' which strips foreign sovereigns of their

immunity in certain circumstances. Plaintiffs argue that it is this narrower definition of sovereign immunity that now defines what sort of immunity the IOIA applies to international organizations. Although this argument has been rejected by at least one other Court of Appeals, *see Atkinson v. Inter-American Dev. Bank*, 156 F.3d 1335, 1340-42 (D.C. Cir. 1998), we need not resolve whether plaintiffs' argument is correct for at least two reasons. The first is that, whatever immunities are possessed by other international organizations, the CPIUN unequivocally grants the United Nations absolute immunity without exception. The second is that the plaintiffs have not presented any argument, either at the district level or to us, which would suggest that one of FSIA's exceptions to immunity would apply. Therefore, even under the plaintiffs' interpretation of the IOIA, the United Nations would still be immune from suit.

The plaintiffs also sued three former United Nations officials. The CPIUN also addresses their immunity: "The Secretary-General and all Assistant Secretaries-General shall be accorded . . . the privileges and immunities . . . accorded to diplomatic envoys, in accordance with international law." *Id.* art. v, sect. 19. As we have determined above that the CPIUN is a self-executing treaty, this provision is binding on American courts. International law provides extensive protection for diplomatic envoys. *See* The Vienna Convention on Diplomatic Relations, Apr. 18, 1961, *entered into force with respect to the United States Dec.* 13, 1972, 23 U.S.T. 3227 (the "VCDR").

Although current diplomatic envoys enjoy absolute immunity from civil and criminal process, *see id.* art. 31, former diplomatic envoys retain immunity only "with respect to acts performed by such a person in the exercise of his functions" as a diplomatic envoy. *Id.* art. 39, para. 2. As the plaintiffs have sued former United Nations officials, each of whom held a rank of Assistant Secretary-General or higher, it is this functional immunity, which the CPIUN incorporates by reference, that is relevant. The Diplomatic Relations Act of 1978, 22 U.S.C. § 254d, makes pellucid that American courts must dismiss a suit against anyone who is entitled to immunity under either the VCDR or other laws "extending diplomatic privileges and immunities." As CPIUN section 19 is such a law, the remaining question is whether the plaintiffs' allegations against the individual defendants involve acts that the defendants performed in the exercise of their United Nations functions.

When a court attempts to determine whether a defendant is seeking immunity "with respect to acts performed by such a person in the exercise of his functions," VCDR art. 39, para. 2, the court must do so without judging whether the underlying conduct actually occurred, or whether it was wrongful.[**]

[**] This test parallels the objective tests we have adopted in applying other forms of immunity. For instance, a prosecutor is immune from suit under 42 U.S.C. § 1983 "for virtually all acts . . . associated with his function as an advocate." *Dory v. Ryan*, 25 F.3d 81, 83 (2d Cir. 1994). In applying that functional test, we have looked to the objective acts of the prosecutor in

(Continued on following page)

Of the plaintiffs' seven claims, all except the fourth make allegations with respect to acts that the defendants performed in exercise of their official functions, namely, their management of the office in which the plaintiffs worked. The first two claims allege that defendants discriminated against Brzak in the conditions of her employment and retaliated against her, both in violation of Title VII. The fifth claim alleges that the defendants retaliated against Ishak in violation of Title VII as well. These allegations involve personnel management decisions falling within the ambit of the defendants' professional responsibilities. Brzak's third claim, for intentional infliction of emotional distress, also relates to the management of the office, because it challenges the defendants' conduct in investigating Brzak's claims, and charges retaliation through changes of her work assignments. The sixth and seventh claims, which allege violations of RICO, also relate to Annan's and Lubbers' roles as United Nations officials.

The only remaining claim is the fourth, in which Brzak alleges Lubbers committed the state law tort of battery. We have said that if a plaintiff's federal claims are dismissed before trial, "the state claims should be dismissed as well." *Cave v. E. Meadow Union Free Sch. Dist.*, 514 F.3d 240, 250 (2d Cir. 2008) (quoting *United Mine Workers of Am. v. Gibbs*,

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question, not to the type of injury alleged. *Doe v. Phillips*, 81 F.3d 1204, 1209 (2d Cir. 1996).

383 U.S. 715, 726 (1966)). Because Brzak's federal claims were dismissed on jurisdictional grounds at the very beginning of the case, there was no colorable basis for the district court to exercise supplemental jurisdiction over her state law claim. We thus affirm the district court's dismissal without reaching Brzak's argument that the claim involves conduct outside the scope of the defendant's immunity. Brzak is free to re-file her battery claim in the state courts. If she does so, the state court would need to adjudicate in the first instance the defendant's claim of immunity.

The appellants raise several constitutional objections to the proposition that the United Nations and its former officials enjoy immunity. Specifically, they contend that such a grant of immunity would violate their procedural due process right to litigate the merits of their case, their substantive due process right to access the courts, their First Amendment right to petition the government for redress of grievances, and their Seventh Amendment right to a jury trial on their common law claims. Each of these arguments fails, as each does no more than question why immunities in general should exist.

The short – and conclusive – answer is that legislatively and judicially crafted immunities of one sort or another have existed since well before the framing of the Constitution, have been extended and modified over time, and are firmly embedded in American law. *See, e.g.*, Act for the Punishment of Certain Crimes Against the United States, 25, 1 Stat. 112, 117-18 (1790) (diplomatic immunity); The

Schooner Exchange v. McFadden, 11 U.S. (7 Cranch) 116 (1812) (foreign sovereign immunity); *Tenney v. Brandhove*, 341 U.S. 367, 376-77 (1951) (legislative immunity); *Barr v. Matteo*, 360 U.S. 564, 573 (1959) (plurality) (executive official immunity); *Pierson v. Ray*, 386 U.S. 547, 554-55 (1967) (judicial immunity); *Imbler v. Pachtman*, 424 U.S. 409, 424 (1976) (prosecutorial immunity); *National City Bank of New York v. Republic of China*, 348 U.S. 356, 358-60 (1955) (discussing the history of foreign sovereign immunity since *Schooner Exchange*); *See generally* Linda S. Frey & Marsha L. Frey, The History of Diplomatic Immunity (1999) (tracing the concept of diplomatic immunity from ancient Greek society forward to the twentieth century). If appellants' constitutional argument were correct, judicial immunity, prosecutorial immunity, and legislative immunity, for example, could not exist. Suffice it to say, they offer no principled arguments as to why the continuing existence of immunities violates the Constitution.

CONCLUSION

The judgment of the district court is affirmed.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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CYNTHIA BRZAK and
NASR ISHAK,

Plaintiffs,

-against-

THE UNITED NATIONS,
KOFI ANNAN, WENDY
CHAMBERLIN, RUUD
LUBBERS, et al.

Defendants.

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06 Civ. 3432

OPINION

(Filed Apr. 29, 2008)

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Sweet, D.J.

The United Nations ("U.N.") has moved under Fed. R. Civ. P. 12(b)(1) to dismiss the complaint of Cynthia Brzak ("Brzak") and Nasr Ishak ("Ishak") (collectively, the "Plaintiffs") and to intervene pursuant to Fed. R. Civ. P. 24. For the reasons set forth below, the United Nation's motion to dismiss is granted.

Prior Proceedings

On October 28, 2005, Brzak filed a Title VII claim against the U.N., Kofi Annan ("Annan"), Wendy Chamberlin ("Chamberlin"), Ruud Lubbers ("Lubbers"), and five other individual defendants (collectively, "Individual Defendants") with the Equal Opportunity Employment Commission ("EEOC"). On January 31, 2006, the EEOC issued a Dismissal and Notice of Rights in which the EEOC determined that it lacked jurisdiction over the claim.

Brzak and Ishak filed their complaint on May 4, 2006. According to the complaint, the Plaintiffs, Brzak, a citizen of the United States, and Ishak, a French and Egyptian national, were both employed by the Office of the U.N. High Commissioner for Refugees ("UNHCR"), located in Geneva, Switzerland. *Complaint* ¶¶ 7-8. Brzak alleges that she was grabbed in a sexual manner by Lubbers at the conclusion of a business meeting in Lubbers' office in Geneva in December 2003. *Id.* ¶ 19. Lubbers was the U.N. High Commissioner for Refugees at the time

and remained in that capacity until February 2005. *Id.* ¶ 11. Brzak alleges that she sought advice on how to respond to the alleged incident from Ishak (who worked in the UNHCR Inspector General's office), and that Ishak advised Brzak to file a complaint with the U.N.'s Office of Internal Oversight Services ("OIOS"). *Id.* ¶¶ 21, 24. Brzak filed an OIOS complaint on April 27, 2004. *Id.* ¶ 22. Thereafter, Lubbers and other superiors retaliated against her by, among other things, displaying open hostility toward her, verbally harassing her, and giving her unmanageable work assignments. *Id.* ¶¶ 23, 25. Ishak similarly claims that, after it became known that he had counseled Brzak to file and [sic] OIOS complaint, he was not given a promotion for which he had been recommended, and that Lubbers attempted to abolish the office to which Ishak was attached. *Id.* ¶ 24. Plaintiffs allege that the OIOS issued a report that confirmed Brzak's allegations, but that the report's findings were subsequently rejected by Annan, the U.N. Secretary-General at the time. *Id.* ¶¶ 22, 25. According to the complaint, Brzak filed a formal appeal from the Secretary-General's decision within the U.N.'s internal dispute resolution system, *id.*,[1] but

[1] The U.N. has an internal dispute resolution system pursuant to its Charter, which specifies that "the staff [of the U.N.] shall be appointed by the Secretary-General under regulations established by the General Assembly," U.N. Charter art. 101, para. 1, and Chapter XI of the Staff Regulations of the United Nations, which outlines procedures for appealing employment-related disputes.

the complaint does not indicate that Brzak pursued the appeal process to completion.

The Plaintiffs assert causes of action principally under Title VII, as well as causes of action for intentional infliction of emotional distress, indecent battery, and civil RICO violations. *Id.* ¶¶ 27-59. The U.N. and eight individual U.N. officials were initially named as defendants. *Id.* ¶¶ 9-17. Plaintiffs filed certificates of service purporting to reflect service on the U.N. and, by service on the U.N., Annan on October 16, 2006, Chamberlin on May 8, 2007, and Lubbers on June 8, 2007. All papers purporting to constitute service at U.N. Headquarters were formally returned by the United Nations to the United States Mission to the United Nations.

At a status conference held on June 6, 2007, the Court requested that the United States and, if appropriate, the United Nations, brief the issue of immunity by September 17, 2007. That date was subsequently extended by the Court to October 2, 2007. On July 20, 2007, with Plaintiffs' consent, the Court dismissed the case against all Defendants except the United Nations, Annan, Chamberlin and Lubbers, and stayed the action with respect to all other issues pending briefing on the immunity issue.

On October 2, 2007, pursuant to 28 U.S.C. § 517, the United States made a submission with respect to

the immunities involved and the U.N. Secretary-General's position on the application of those immunities to the Plaintiffs' allegations.[2]

This motion was heard on October 31, 2007.

The Interest of the United States

The United States' interest arises from the nation's treaty obligations to respect the applicable immunities of the U.N. and its officials. *See generally Tachiona v. United States*, 386 F.3d 205, 212 (2d Cir. 2004) ("A corollary to the executive's power to enter into treaties is its obligation to ensure that the United States complies with them."). These immunities arise from the U.N. Charter and the Convention on Privileges and Immunities of the United Nations, Feb. 13, 1946, 21 U.S.T. 1418 (the "General Convention"), both treaties to which the United States is a party.

According to the submission on behalf of the United States, pursuant to the foregoing treaties, the U.N. itself is absolutely immune from suit and legal process absent an express waiver. The U.N. has not expressly waived its immunity with respect to this

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[2] 28 U.S.C. § 517 provides that the "Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States."

case. To the contrary, it has explicitly affirmed its immunity by letters addressed to the United States' Ambassador to the U.N. dated May 15, 2006, and October 19, 2006.

The United States asserts that the General Convention also grants the Secretary-General and all Assistant Secretaries-General, which include both the High Commissioner and Deputy High Commissioner for Refugees, "the privileges and immunities . . . accorded to diplomatic envoys, in accordance with international law." General Convention art. V, § 19. The privileges and immunities accorded to diplomatic envoys are specified in turn by the Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95 ("VCDR"). Under the VCDR, diplomatic officials sued after leaving office continue to receive immunity "with respect to acts performed . . . in the exercise of [their] functions." *Id.* art. 39(2).

The United States further argues that, beyond these treaty provisions specifically applicable to the Secretary General and Assistant Secretaries-General, the General Convention also provides that U.N. officials generally, whether current or former, are immune from suit and legal process "in respect of words spoken or written and all acts performed by them in their official capacity." General Convention art. V, § 18(a).

Finally, the United States argues that under the International Organizations Immunities Act, 22

U.S.C. §§ 288 et seq. ("IOIA"), the officers and employees of any international organization covered by the statute, including the U.N., receive immunity from suit and legal process as to "acts performed by them in their official capacity and falling within their functions as such . . . officers, or employees." 22 U.S.C. § 288d(b).

In accordance with its treaty obligations to communicate the views of the Secretary-General, *see* Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission of Human Rights, 1999 I.C.J. 62, 87 (Apr. 29), the United States has conveyed to the Court the position of the Secretary-General that the three remaining Individual Defendants are entitled to immunity in this matter. The International Court of Justice has advised that the Secretary-General's views concerning the scope of immunity owed to U.N. officials should normally be accorded a high degree of deference. *See id.* at 61; *cf. Leuwyler v. Office of Her Majesty Queen Rania Al-Abdullah*, 184 F. Supp.2d 277, 287 (S.D.N.Y. 2001) (noting that "great weight" is to be given to any extrinsic submissions by foreign governments with regard to the scope of official acts immunity under the Foreign Sovereign Immunities Act).

The United States did not take a position on the applicability of official acts immunity to any of the allegations in this case.

The Provisions Relating to Immunity

Article 105 U.N. Charter provides that the U.N. "shall enjoy . . . such privileges and immunities as are necessary for the fulfillment of its purposes," and that its officials "shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization."

The General Convention defines the privileges and immunities relating to the United Nations and its officials. Article II, section 2 provides that "[t]he United Nations . . . shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity." The Secretary-General and all high officials serving at the level of Assistant Secretary-General and above are granted the same "privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law." General Convention art. V § 19.

Under Article 31 of the VCDR, current high officials enjoy immunity from criminal and civil jurisdiction, subject to limited exceptions. VCDR art. 31(1). Former high officials enjoy continuing immunity "with respect to acts performed . . . in the exercise of [their] functions. . . ." *Id.* art. 39(2). Under United States law, suits against U.N. officials who are immune under these provisions must be dismissed. *See* Diplomatic Relations Act § 5, 22 U.S.C. § 254d (1978) (mandating dismissal where immunity

conferred by VCDR "or under any other laws extending diplomatic privileges and immunities").

In addition to the diplomatic immunity granted the Secretary-General and high officials, the General Convention provides the Secretary-General and certain U.N. officials immunity "from legal process in respect of words spoken or written and all acts performed by them in their official capacity." General Convention art. V § 18(a). The Secretary-General is to specify the categories of officials to which this immunity extends, and communicate those categories to the Governments of all member states. *Id.* art. V § 17.

A similar immunity is recognized by the IOIA, which provides that "[i]nternational organizations . . . shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments, except to the extent that such organizations may expressly waive their immunity for the purpose of any proceedings or by the terms of any contract." IOIA § 288a(b);[5] *see* Exec. Order No. 9,698, 11 Fed. Reg. 1809 (1946) (designating United Nations as an international organization covered by the IOIA). The IOIA also provides United Nations officials and employees "immun[ity] from suit and legal process relating to acts performed by them in

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[5] The scope of immunity enjoyed by foreign governments is defined by the Foreign Sovereign Immunities Act, 28 U.S.C.A. § 1602 et seq. (1976).

their official capacity and falling within their functions as such . . . officers, or employees except insofar as such immunity may be waived by the . . . international organization concerned." 22 U.S.C. § 288d(b).

Under art. V, § 20 of the General Convention, the Secretary-General has "the right and the duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations." Section 21 further provides that the United Nations "shall co-operate at all times with the appropriate authorities of Members to facilitate the proper administration of justice, secure the observance of police regulations and prevent the occurrence of any abuse in connection with the privileges, immunities and facilities mentioned in this Article."

Intervention is Not Necessary

The U.N. has moved to intervene "in the cases of the individual defendants" for the limited purpose of asserting their immunity from suit. Because the U.N. is a named defendant, and therefore already a party to this case, it is not necessary for the U.N. to intervene.

However, the U.N. may make a special appearance in the case for the purpose of asserting immunity with regard to itself and the Individual Defendants. The immunity at issue here is a right

belonging to and waivable only by the U.N. *See* General Convention § 20 ("Privileges and immunities are granted to [U.N.] officials in the interests of the United Nations and not for the personal benefit of the individuals themselves."); *id.* (Secretary-General holds "the right and duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations").

The Complaint Against the U.N. is Dismissed

Under the General Convention, the United Nations is cloaked with absolute immunity "from every form of legal process except insofar as in any particular case it has expressly waived its immunity." General Convention art. II, § 2. *See also* IOIA § 288a(b); 11 Fed. Reg. 1809. Accordingly, where, as here, the United Nations has not waived its immunity, the General Convention mandates dismissal of Plaintiffs' claims against the United Nations for lack of subject matter jurisdiction. *See De Luca v. United Nations Org.*, 841 F. Supp. 531, 533 (S.D.N.Y. 1994), *aff'd*, 41 F.3d 1502 (2d Cir. 1994); *Boimah v. United Nations Gen. Assembly*, 664 F. Supp. 69, 71 (E.D.N.Y. 1987). All claims against the United Nations are therefore dismissed.

The Claims Against the Remaining Individual Defendants Are Dismissed

Under Article V § 19, of the General Convention, the Secretary-General and all high officials serving at the level of Assistant Secretary-General and above are granted the same "privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law." General Convention § 19. As a result, Annan, Chamberlin and Lubbers, as former high officials of the United Nations, are subject to the immunity provisions accorded to diplomatic envoys under the VCDR, and thereby enjoy continuing immunity "with respect to acts performed . . . in the exercise of [their] functions." *See* VCDR Art. 31, 39.

Annan, Chamberlin and Lubbers also enjoy the protections afforded by the Diplomatic Relations Act, which requires dismissal of any case where immunity is conferred by the VCDR, and thereby enjoy continuing immunity "with respect to acts performed . . . in the exercise of [their] functions." *See* 22 U.S.C.A. § 254d. Even if these instruments did not apply, these defendants would enjoy immunity under § 18(a) of the General Convention.

Furthermore, the three remaining Individual Defendants are entitled to immunity under the IOIA, which extends to officers and employees of the U.N. immunity from legal process "relating to acts performed by them in their official capacity and

falling within their functions," unless such immunity is waived. *See* 22 U.S.C. 288d(b).

As the Legal Counsel of the Organization advised the Deputy Permanent Representative of the United States of America by letter dated May 15, 2006, and the Permanent Representative of the United States by letter dated October 19, 2006, the Secretary-General has determined that the Individual Defendants named in the Brzak case are immune. As such there is no waiver.

The question of whether the suit "relates to" acts performed by the Individual Defendants in their official capacity is determined on the basis of whether the acts alleged occurred in the course of an official's exercise of functions, and not on the nature of the underlying conduct. *See, e.g.*, *Donald v. Orfila,* 788 F.2d 36, 37 (D.C. Cir. 1986); *De Luca v. United Nations Org.*, 841 F.Supp. 531, 534-35 (S.D.N.Y. 1994).

The courts have consistently held that employment-related issues lie at the core of an international organization's immunity. For example, in *Mendaro v. World Bank,* 717 F.2d 610 (D.C. Cir. 1983), the D.C. Circuit held that, notwithstanding a broad waiver in the World Bank's founding treaty, IOIA immunity protected the Bank from a Title VII suit by a former employee who alleged that she had been the victim of sexual discrimination and physical and verbal sexual harassment by her coworkers. The Court excluded employment suits from the waiver, observing that

compliance with the employment policies of over 100 Member States would be "nearly impossible," *id.* at 618-19, and noting that "one of the most important protections granted to international organizations is immunity from suits by employees of the organization in actions arising out of the employment relationship." *Id.* at 615. *See also Broadbent v. Org. of Am. States*, 628 F.2d 27, 35 (D.C. Cir. 1980) (holding that international organization's employment of plaintiff could not constitute "commercial activity" under restrictive theory of immunity); *Morgan v. Int'l Bank for Reconstr. and Dev.*, 752 F. Supp. 492, 493 (D.D.C. 1990) (holding that international organizations are immune under IOIA and international law from suits "arising out [of] their internal operations").

For similar reasons, the courts have consistently found that functional immunity applies to employment-related suits against officials of international organizations. *See, e.g.*, *De Luca*, 841 F. Supp. at 536 (holding officials immune against claims that they, among other things, initiated a retaliatory tax audit and forged plaintiff's pay statement); *Broadbent*, 628 F.2d at 34 ("International officials should be as free as possible, within the mandate granted by the member states, to perform their duties free from the peculiarities of national politics."); *D'Cruz v. Annan*, 2005 WL 3527153 (S.D.N.Y. December 22, 2005) (holding that current and former U.N. officials are immune under the General Convention and IOIA from employment discrimination and retaliation claims).

The Secretary General's determination that the Individual Defendants are immune from suit is dispositive. Plaintiffs' allegations of employment discrimination and retaliation are addressed against Annan only as a decisionmaker in the internal employment dispute resolution process and against Chamberlin only as a senior supervisor in the Office of the UNHCR. *Cf. McGehee v. Albright*, 210 F. Supp. 2d 210, 217-18 (S.D.N.Y. 1999); *Broadbent*, 628 F.2d at 34; *De Luca*, 841 F. Supp. at 536; *D'Cruz*, No. 05-8918, 2005 WL 3527153 at *1.

The allegations of sexual harassment and "indecent battery" against Lubbers are allegations of abuse of authority in the workplace. Whether Lubbers' alleged acts were intended or perceived as sexual in nature may be relevant to their wrongfulness, but not to the determination of functional immunity. In *De Luca*, the court rejected the notion that immunity did not apply to U.N. officials' alleged forgery and other wrongful conduct in the workplace — acts clearly outside the scope of the officials' job descriptions. The court held that, "[n]otwithstanding how improper any of these actions may have been, they represent precisely the type of official activity which § 7(b) of the IOIA was intended to immunize." *De Luca*, 841 F. Supp. at 535. *See also Askir v. Boutros-Ghali*, 933 F. Supp. 368, 373 (S.D.N.Y. 1996) ("The plaintiff's allegations of malfeasance [in failing to pay rent for property occupied during peacekeeping

action] do not serve to strip the United Nations or [its official] of their immunities afforded under the U.N. Convention."); *Boimah v. United Nations Gen. Assembly*, 664 F. Supp. 69, 72 (E.D.N.Y. 1987) (in a harassment and assault case, U.N. officials would have been immune because "employment-related decisions by officers charged with such responsibilities fall within the scope of [IOIA] immunity . . . even where the motives underlying the action are suspect"); *cf. Morgan*, 752 F. Supp. 492 (dismissing on grounds of immunity; although allegations were "a most serious infringement of an employee's rights," they concerned employment relationship and therefore allegations that conduct of officials was improper were irrelevant).

If the rule were otherwise, routine allegations of wrongful conduct or improper motive would defeat the immunity, and "the solid protection" that "Congress intended to afford" international organizations and their officials "would indeed be evanescent." *Donald v. Orfila*, 788 F.2d 36, 37 (D.C. Cir. 1986).

Conclusion

For the reasons set forth above, the complaint is dismissed in its entirety for lack of subject matter jurisdiction.

It is so ordered.

New York, N.Y.
April 29, 2008

/s/ Sweet
ROBERT W. SWEET
U.S.D.J.

Table 13.3
U.S. Department of State Protocol Staffing Statistics, 15 March 1998

	E	F16	C	H	M	O	OAS	I	U	UNS	Total
Diplomats	2,750	0	0	0	0	190	2	34	1,782	49	4,767
Dependents	5,689	0	0	0	0	320	5	51	3,009	56	9,140
Career consular officers	3	0	2,142	0	0	0	0	0	0	0	2,146
Dependents	8	0	3,330	0	0	0	0	0	0	0	3,338
Honorary consular officers	0	0	73	922	0	0	0	0	0	0	995
Dependents	0	0	95	899	0	0	0	0	0	0	994
Administrative & technical staff	4,474	31	4,257	11	2,371	65	634	16,150	1,720	5,530	35,273
Dependents	5,720	55	3,405	6	2,632	64	548	19,070	1,906	6,148	39,852
Service staff	1,011	0	325	0	104	30	1	31	427	176	2,105
Dependents	1,096	0	289	0	69	16	0	24	473	37	1,984
Personal servants (domestics)	952	0	441	0	61	52	69	1,365	425	436	3,801
Dependents	89	0	35	0	14	3	5	44	30	0	220
Total	21,772	86	14,406	1,789	5,251	740	1,367	36,799	9,755	12,429	104,594

Note: E = embassy; F16 = embassy (military); C = consular; H = hon. consular officers; M = miscellaneous staff members; O = Organization of American States missions; OAS = Organization of American States secretariat; I = international organization; U = United Nations mission; UNS United Nations secretariat

Note to the Secretary-General

1. On 24 May 2004, I sent you a preliminary report on the complaint against Mr. Ruud Lubbers, of misconduct involving sexual harassment. OIOS has since completed the investigation into this complaint and the report is attached.

2. OIOS has concluded that the allegation against Mr. Lubbers is substantiated in that Mr. Lubbers did engage in unwanted physical contact with the complainant, a subordinate female staff member. New allegations that came to OIOS' attention during the investigation, were also examined and indicate a pattern of sexual harassment by Mr. Lubbers. OIOS is also of the view that Mr. Lubbers abused his authority as High Commissioner by his intense, pervasive and intimidating attempts to influence the outcome of this investigation.

3. OIOS recommends that appropriate action be taken against Mr. Lubbers for misconduct and abuse of authority as set out in the attached report.

4. I am ready to provide any further clarifications on the report should you deem it necessary.

/s/ Dileep Nair
Dileep Nair
Under-Secretary General
for Internal Oversight Services
2 June 2004

REPORT OF INVESTIGATION INTO MISCONDUCT AND ABUSE OF AUTHORITY AT UNHCR

I. Executive Summary

1. The Investigations Division of the Office of Internal Oversight Services [OIOS] received a complaint from Mrs. Cynthia Brzak, a staff member of the Office of the United Nations High Commissioner for Refugees [UNHCR], who alleged that she had been sexually harassed by Mr. Ruud Lubbers, High Commissioner, UNHCR, and was subsequently harassed by Mr. Werner Blatter, Director, Division of Human Resources Management [DHRM], UNHCR.

2. Mrs. Brzak addressed a copy of the same complaint to the Inspector-General's Office, UNHCR [IGO]. However, given that one of the allegations involved the highest-ranking UNHCR official, the IGO, as per its terms of reference, was precluded from initiating an investigation into the matter, and OIOS became responsible for handling the case, but with assistance as necessary from the IGO. Given the nature of the complaint, OIOS opened an investigation under its terms of reference, of misconduct and abuse of authority by Mr. Lubbers and Mr. Blatter.

3. The misconduct alleged involved sexual harassment both in conduct and in words. The abuse of authority involved actions on the part of Mr. Lubbers after he was notified of the details of the complaint by the UNHCR Inspector General on 6 May 2004.

4. In her complaint, Mrs. Brzak alleged that on 18 December 2003, at the end of an official meeting held in the UNHCR office of Mr. Lubbers, which was attended by five other male colleagues, Mr. Lubbers engaged in inappropriate and unwelcome sexual conduct which included physical contact of a highly personal nature with her.

5. Mrs. Brzak also alleged that following the meeting, Mr. Blatter referred to the conduct of Mr. Lubbers and then attempted to replay the same conduct, much to her embarrassment and chagrin. Mrs. Brzak further alleged that a few days later when she and her colleagues were waiting outside their UNHCR offices, Mr. Blatter again referred to the behaviour of Mr. Lubbers and tried to grab her.

6. Messrs. Lubbers and Blatter denied that they had engaged in the conduct alleged by Mrs. Brzak. However, OIOS found that the allegations of Mrs. Brzak were credible, and based upon the overall evidence adduced during its investigation, OIOS has concluded that Mr. Lubbers had engaged in serious acts of misconduct and abuse of authority and that Mr. Blatter had engaged in acts of misconduct in this case.

7. In the course of this investigation, OIOS was apprised of several other cases of Mr. Lubbers engaging in misconduct involving UNHCR staff or women closely affiliated with UNHCR. in at least four of these cases, OIOS has interviewed the women concerned and corroborated the incidents with others in

whom they had confided. These cases indicate a pattern of such misconduct on the part of Mr. Lubbers.

8. The purpose of this report is for the Secretary-General to be provided with the detailed findings of the OIOS investigation and recommendations for appropriate action in response to these findings.

II. Methodology

9. Upon receiving the complaint of Mrs. Brzak, OIOS dispatched two Investigators to Geneva for a preliminary assessment of the matter. Following an initial interview of the complainant and upon obtaining additional information, OIOS determined that a formal investigation into acts of misconduct and abuse of authority was warranted.

10. The investigation included interviews with current and former UNHCR staff members and other persons, with some interviewed more than once in order to ensure accuracy, completeness and fairness, and the collection of relevant documentary evidence.

11. Given the seriousness and sensitivity of the allegations and the position of the persons involved, all interviews with UNHCR staff members based in Geneva, except the one with Mr. Lubbers which was held in his office, were conducted outside the premises of UNHCR, to protect confidentiality and provide privacy and anonymity, as necessary. Additionally, telephone interviews were conducted with persons who were not present in Geneva and who possessed

relevant information for the investigation. The Investigators were especially careful in their contacts with staff members and others, and in the protection of case files.

III. Background Information

12. Mrs. Brzak joined UNHCR in 1980. For the last 14 years she has been working in the Staff Development and Training Section, Division of Resources Management of UNHCR. She is a Training Assistant and has an indefinite contract at the G-6 step 12 level.

13. Mrs. Brzak has worked extensively with and on UNHCR Staff Council related matters and has chaired the Panel on staff career development. She has also served as a member of the Joint Advisory Committee (JAC), a principal consultative body created in 1990 which calls for the establishment of appropriate joint staff-management machinery and advises the High Commissioner on questions related to staff administration, human resources policies and general questions of staff welfare. In October 2003, Mrs. Brzak ran for the position of Staff Council Chairperson. She lost by one vote to the current incumbent, Mr. Joseph Hegenauer, but remains active in the Staff Council.

14. On 18 December 2003, at around 15:00 hours, a JAC related meeting was held in the office of Mr. Lubbers. In attendance were Mr. Lubbers, Mr. Athar Sultan-Khan, his Chef de Cabinet and Mr. Werner

Blatter, his Director, DHRM as well as, in the capacity of Staff Council members or experts, Mr. Hegenauer, Mrs. Brzak, Mr. Abid Mir and Mr. Kandiah Vanniasingam.

IV. Investigative Details

15. In her complaint dated 27 April 2004, sent to OIOS and to the Inspector's General Office of UNHCR, Mrs. Brzak alleged that at the end of the above-mentioned meeting, she had been sexually harassed by both Messrs. Lubbers and Blatter.

16. Her allegation against Mr. Lubbers is that at the end of the 18 December meeting, Mr. Lubbers placed his hands on Mrs. Brzak's waist, pulled her back towards him, pushed his groin into her buttocks and held her briefly in that position before releasing her.

17. Her allegation against Mr. Blatter is that, using a tone and an attitude of amusement, Mr. Blatter tried to replay the incident between Mrs. Brzak and Mr. Lubbers. The first time was on 18 December 2003, when shortly after the meeting held in the office of Mr. Lubbers, he joined Mrs. Brzak and her colleagues, raised the incident between her and Mr. Lubbers and moved towards her to replicate it. The second time was a few days later when he joined Mrs. Brzak and her colleagues outside their offices, in the elevator area, and while referring again to the same incident, unsuccessfully tried to grab her.

Allegation 1:

It is alleged that at the end of an official meeting held in his office on 18 December 2003, Mr. Lubbers committed misconduct in that he engaged in inappropriate and unwelcome sexual conduct which included physical contact with a female staff member in UNHCR.

18. The statements provided to OIOS by all persons who attended the meeting agree on the following points:

a. all of them attended the meeting at the time and location indicated in the complaint of Mrs. Brzak;

b. the meeting was cordial and professional;

c. Mr. Lubbers sat on one side of the table, with Mrs. Brzak on his left side and Mr. Sultan-Khan on his right side;

d. Mr. Blatter sat in front of Mrs. Brzak, on the other side of the table, together with Messrs. Hegenauer, Mir and Vanmasingam;

e. at the end of the meeting, all persons in attendance rose from their seats;

f. Messrs. Hegenauer, Mir and Vanmasingam left the room *before* Mrs. Brzak; and

g. when Mrs. Brzak rose and passed in front of Messrs. Lubbers and Sultan Khan, who were standing together, Mr. Blatter was still sitting across the table.

19. As regards the nature of the physical contact between Mr. Lubbers and Mrs. Brzak, the statement of Mrs. Brzak differs from that of the three others present at the time of the incident, namely Messrs. Blatter, Lubbers and Sultan-Khan.

a. Mrs. Brzak

20. Mrs. Brzak told OIOS that when she passed in front of Mr. Lubbers, who was standing behind her together with Mr. Sultan-Khan, without a word he abruptly put both of his hands on her waist from behind her, pulled her backwards towards him, took a step forward, pushed his groin to her buttocks and held her briefly in that position. Mrs. Brzak indicated that while Mr. Lubbers was acting in this manner, she noted the expression of great surprise on the face of Mr. Blatter, who, as she put it, "had a shocked look on his face, his mouth was open and his jaw dropped."

21. Mrs. Brzak added that although she was shocked and humiliated by the behaviour of Mr. Lubbers, she did not react immediately; she left the room without looking back and joined her colleagues who were standing by the elevator door on the 7th floor, where the office of Mr. Lubbers is located. She added that shortly thereafter, Mr. Blatter joined the group and they all took the elevator to the ground floor.

b. Mr. Blatter

22. Mr. Blatter said that he saw Mr. Lubbers touching Mrs. Brzak twice. The first time occurred just after the meeting when she passed in front of Mr. Lubbers who put his arm around her waist while talking to her, and a second time, in the same fashion, he put his arm around her while "he led her along towards the door." Significantly, Mr. Blatter described these gestures by Mr. Lubbers as "overly familiar".

23. Further, he said that after the 18 December meeting, when he recalled how Mr. Lubbers had touched Mrs. Brzak at the end of the meeting, he told her "you saw how nice is the HC?" though not, as alleged by Mrs. Brzak "I saw what the HC did to you". He said that if he had seen Mr. Lubbers do anything improper, he would have intervened to protect Mrs. Brzak. However, he told OIOS that he had told Mr. Lubbers that his touching of Mrs. Brzak around the waist was "overly familiar".

c. Mr. Sultan-Khan

24. When asked whether he observed anything unusual during or after the meeting, Mr. Sultan-Khan recalled only that Mrs. Brzak had requested a pen and Mr. Lubbers gave her one. However, when asked whether Mr. Lubbers, at any point before, during or after the meeting on 18 December, had touched Mrs. Brzak, Mr. Sultan-Khan replied that he "did not see this". He conceded that from the position where he

was standing (that is, next to Mr. Lubbers) he should have noticed any physical contact between Mr. Lubbers and Mrs. Brzak. He could not explain why his recollection differed from Mr. Blatter's.

d. Mr. Lubbers

25. At the outset of his interview, Mr. Lubbers requested that OIOS provide him with a copy of the complaint made against him, that he be allowed to have a third party present during the interview and that he be afforded the opportunity to review and sign the record of discussion with him. OIOS responded that pursuant to its own mandate, terms of reference and investigative protocols, there is no requirement to provide copies of complaints nor is there a requirement that a third party be entitled to attend the interview. Moreover, Mr. Lubbers was fully aware of the details of the complaint, including the identity of the complainant because, at the request of the Under-Secretary-General, OIOS, the Inspector General of UNHCR had notified him of the complaint on 6 May 2004. Further, the Office of Legal Affairs has long advised OIOS that subjects of interview are not entitled to counsel in OIOS interviews. As is usual in administrative investigative practice, OIOS does not normally allow such third parties in order to protect against inappropriate disclosure of information. In any case, at the beginning of the interview, Mr. Lubbers was apprised of the allegation of misconduct made against him and he was invited to comment on it extensively. After the interview, he was provided

with a copy of the record of discussion and was allowed to make editorial changes, clarify any misunderstanding, and offer any further comments. As such, OIOS rejects the charge, made days later by Mr. Lubbers, that he was not afforded due process.

26. When asked whether there was any physical contact between him and Mrs. Brzak at the end of the 18 December meeting, Mr. Lubbers initially told OIOS: "I cannot exclude that I might have touched her." He was emphatic that if he did touch her, he did so only in order to usher her out of the room, and not with the intent to embarrass her. He added that there were only two times during that meeting when he had had physical contact with Mrs. Brzak; the first was when he lent her a pen and the second was when, at the end of the meeting, he ushered her out of the room, "in a friendly manner".

27. When advised that Mr. Blatter had told OIOS that he had twice seen Mr. Lubbers putting his arm around the waist of Mrs. Brzak, Mr. Lubbers replied that he was aware of this fact because he had discussed Mrs. Brzak's complaint with Mr. Blatter after the notification by the UNHCR IG. During that discussion, Mr. Blatter had reminded Mr. Lubbers that he had twice touched Mrs. Brzak at her waist. Referring to the statement of Mr. Blatter, he then said that he might have thus touched Mrs. Brzak, but only in a polite and friendly manner, to usher her towards the door.

28. Mr. Lubbers described himself as a "physical" and "friendly" person and while conceding that on occasion he touches people around him, he argued that his gestures should not be construed as improper, but rather as polite and courteous. For example, he said that sometimes, when he shakes hands, he does so using both of his hands.

29. In his interview, Mr. Lubbers was asked if he knew why Mrs. Brzak had filed such a complaint against him. He replied that he did not know but he offered two possible reasons. He noted that he had not remembered Mrs. Brzak when he was first advised of the allegation by the UNHCR IG. Subsequently, he queried his secretary who reminded him that he had met Mrs. Brzak in March or April 2001, when Mrs. Brzak applied for the position of Chef de Cabinet, which was available at that time. Mr. Lubbers said that although not eligible for that position because she was a General Service staff, Mrs. Brzak was interviewed by him at the request of the former Chef de Cabinet who had suggested that to do so would be good for improving the relations with the Staff Council of which Mrs. Brzak was a member. Mr. Lubbers noted that she was not given the job as she was only a General Service staff and after her interview, Mrs. Brzak sent him a note apologizing for having taken up his time. He also described her as "outspoken" and "brutally frank". He said that Mrs. Brzak had made an impression on him, particularly during a farewell party organized in 2003 for Mr. Naveed, the outgoing Staff Council President, during

which she made "a remarkable speech" which suggested that Staff Council members "knew everything" and managers did not. This prompted him to "neutralize" the effect of her speech when he spoke after her with light remarks.

30. Mr. Lubbers gave a second possible reason for her complaint which he had learned from Mr. Blatter. In late 2003, Mrs. Brzak had competed unsuccessfully with Mr. Hegenauer for the position of Chair of the Staff Council. He also recently learned that "things did not go well in the Staff Council". Mr. Lubbers opined that she might have been "frustrated" after she lost the election.

Allegation 2:

It is alleged that on two separate occasions Mr. Blatter committed acts of misconduct in that he tried to replay the incident between Mrs. Brzak and Mr. Lubbers in front of her colleagues.

a Mrs. Brzak

31. Mrs. Brzak told OIOS that on 18 December, upon leaving the office of Mr. Lubbers, she joined Messrs. Hegenauer, Mir and Vanniasingam who were waiting for the elevator. Shortly thereafter, Mr. Blatter joined them and they all took the elevator to the ground floor. As they exited the elevator on the ground floor, a smiling Mr. Blatter told her "I saw what the HC did to you" and, in a playful manner

tried to grab her, in an attempt to imitate the action of Mr. Lubbers. This made her feel further humiliated, after the incident with Mr. Lubbers.

32. Mrs. Brzak further alleged that a few days later, when she and her colleagues were waiting in the elevator area, preparing for another meeting with Mr. Lubbers, Mr. Blatter came across the atrium to join them. When he approached her, she noted with surprise that he mentioned again the earlier behaviour of Mr. Lubbers to her. In doing so, he moved towards her and, again, tried to grab her. She stated that she had to use Mr. Hegenauer as a human shield, (as he is very tall) trying to keep him between herself and Mr. Blatter, to protect herself from the latter who feinted right and left to get around Mr. Hegenauer.

33. According to Mrs. Brzak, Mr. Blatter then stepped into the elevator and advised the group that he would meet with Mr. Lubbers alone. She added that Mr. Blatter asked her what she would do, should Mr. Lubbers grab her again, to which she said she replied, "But why didn't you protect me . . . or at least say something?" Noticing that Mr. Blatter was laughing at her, she said that she reproved him, saying: "Christ, it's not funny. You're the Director of DHRM!" Mrs. Brzak further said that as the elevator door closed, Mr. Blatter continued to laugh and retorted: "So?"

b. Messrs. Mir, Vanniasingam and Hegenauer

34. When asked to comment on the first incident with Mr. Blatter, Mr. Mir replied that he did not recall the incident but "did not rule it out either". Mr. Vanniasingam said "I didn't see it", but, referring to Mr. Blatter, immediately added that "I do not normally challenge people older than me or in position of authority".

35. Mr. Hegenauer, when questioned, said "I remember them playing and making inside jokes". When further asked to indicate whether Mrs. Brzak had used him as a human shield in the second incident to protect herself against the "jokes" of Mr. Blatter, Mr. Hegenauer replied that he did not remember, but said that this is a group of persons familiar with each other who are used to making jokes. He added, however, "This doesn't mean it did not happen".

c. Mr. Blatter

36. Mr. Blatter denied the allegations made against him by Mrs. Brzak although he admitted "joking with her". He reiterated that the actions of Mr. Lubbers in twice touching the waist of Mrs. Brzak had been "overly familiar".

V. Credibility of the Complainant

37. In cases of this nature, it is usual practice to determine the credibility of the complainant and the

witnesses. While investigating the alleged misconduct, OIOS had to consider the possibility that Mrs. Brzak had falsely accused Mr. Lubbers and Mr. Blatter. One of the key points was why she had waited for four months before filing the complaint.

38. Mrs. Brzak told OIOS that this was not the first time she had been sexually harassed since joining UNHCR. In the more than 20 years she has spent with UNHCR, there were occasions when she had been sexually harassed by other senior managers who, she said, have since left the Organization. She did not complain at the time because she believed that nothing could be done. However, this time, she said that she felt so angry and humiliated that she could not remain silent anymore.

39. Mrs. Brzak further stated that from the time of the incidents until April 2004, she had discussed the matter with several colleagues and friends to elicit their advice because filing a complaint, especially against Mr. Lubbers, was a serious step. To each of them, she said, she had described in detail what Mr. Lubbers and Mr. Blatter had done.

40. In the interviews with the persons consulted by Mrs. Brzak and with others, OIOS corroborated the statement of Mrs. Brzak. It was established that immediately following the 18 December meeting, while in the elevator, Mrs. Brzak had discussed the actions of Mr. Lubbers with Mr. Vanmasingam. Mr. Hegenauer also confirmed the details that Mrs. Brzak had discussed with him in early January 2004.

Further, there is evidence that in February 2004, Mrs. Brzak had sought advice on how to proceed on her case from two members of the Inspector's General Office of UNHCR. Similarly, others interviewed by OIOS confirmed that she had spoken with them in detail and with consistency. OIOS noted that the chronology of events and the details provided by Mrs. Brzak to each of these witnesses were consistent with the complaint made by, and the interview statements of, Mrs. Brzak. In their interviews, the witnesses have confirmed to OIOS the details that Mrs. Brzak had provided to them of the incident with Mr. Lubbers and of the incidents with Mr. Blatter. Most of the witnesses were told either immediately or shortly after the incidents complained of; some were consulted more than once while others were consulted only later as Mrs. Brzak deliberated on how to handle her concerns about raising this complaint. Given the actions of Mr. Lubbers following the reporting of the complaint, her concerns were manifestly not unreasonable.

41. Further, OIOS also queried each person interviewed in connection with this investigation on Mrs. Brzak's character and personality. Mrs. Brzak was described by everyone [except Mr. Lubbers] in very positive terms, as "mature", "very professional", "very strong advocate on matters of principle", "a person who would not make things up" and "articulate and bright".

IV Pattern of Conduct

42. Another indicator in such cases of misconduct is whether there is a pattern of behaviour on the part of the actor. During this investigation OIOS was told of several other cases involving women who were either staff of UNHCR or were closely affiliated with UNHCR. OIOS has interviewed several of the women and corroborators who were able to confirm the incidents. When asked during his interview whether there were other instances, Mr. Lubbers said he only recalled one other incident. OIOS believes Mr. Lubbers referred to this other incident in his May 28 message to all UNHCR staff. However, as he refused to disclose the woman's name to OIOS, it was not possible to resolve that matter.

43. However, there are cases which OIOS has examined which confirm a pattern of misconduct on the part of Mr. Lubbers. The women involved, who were approached by OIOS based on specific reports received from people they had confided in, expressed much concern about being identified and their fear of subsequent retaliation and public humiliation. OIOS advised each of them that while their information would be useful and included in this report, their identities would not be revealed by OIOS. Accordingly, OIOS is providing the following information without identifying the individual women:

a. Staff member A, a young woman, was invited to Mr. Lubbers' home in Geneva on a weekend, ostensibly to discuss her area of work with others. However, when she arrived, she

discovered that no one else was present and that he was interested in discussing only matters of a personal nature while sitting very close to her and touching her in a sexual way. She indicated to OIOS that this made her extremely uncomfortable and had to leave quickly because she felt he was trying to go further and she became afraid. She reported this encounter to others at the time, but did not file a complaint because she felt extremely embarrassed.

b. Staff member B described an incident at an official UNHCR function during which Mr. Lubbers grabbed and embraced her pulling her body against his. She expressed shock and embarrassment and pushed him back. She reported this to other colleagues who confirmed to OIOS that she had done so.

c. Affiliated woman C described an incident where Mr. Lubbers while on mission to her location pulled her to him and tried to grope her. She pushed him back and said she would slap him if he attempted it again. The incident made her very uncomfortable and concerned about her ongoing relationship with UNHCR. OIOS corroborated this report from others who were at the location.

d. Affiliated woman D from another agency which works closely with UNHCR told OIOS that an incident occurred shortly after first meeting Mr. Lubbers at an official event which was attended by Mr. Lubbers as well as herself and her supervisors. Mr. Lubbers

twice made unwelcome advances and asked her to come to his hotel room because he was "feeling lonely". She reported the matter to her supervisor who confirmed the account. Mr. Lubbers apologized to her the following day for his behaviour.

44. It is therefore evident that the incident with this complainant is not an isolated case. Mr. Lubbers has objected to OIOS for conducting inquiries into the other cases. However, this now appears to be based not on the interests of the Organization but on self protection and to avoid disclosure of his pattern of misconduct with women.

Allegation 3:

It is alleged that Mr. Lubbers engaged in acts of abuse of authority in that he undertook measures, utilizing his position of highest authority in UNHCR, which were intended to influence the investigative findings in his favour.

45. Mr. Lubbers was apprised on 6 May by the UNHCR Inspector General and again notified by the Under-Secretary-General of OIOS on the following day that OIOS was undertaking an investigation into the allegation against him, as well as those against his Director, DHRM. Nevertheless he immediately took actions which interfered with the ability of the OIOS Investigators to conduct a thorough investigation before they had even arrived in Geneva.

46. The efforts of Mr. Lubbers to discuss the complaint with potential witnesses before and during the investigation were not appropriate. His actions may well have influenced the statements of at least two subordinates including Mr. Sultan-Khan. However, for reasons not difficult to understand, he decided to play it safe by claiming that he did not see anything, not even the touching described by Mr. Blatter and admitted to by Mr. Lubbers.

47. Other UNHCR staff told OIOS Investigators that they were afraid to discuss the case for fear of retaliation. Indeed, the IGO was tasked by Mr. Lubbers to ascertain who was cooperating with OIOS, although they were advised not to do so by OIOS. Mr. Lubbers also sought to find out with whom Mrs. Brzak had consulted about her case. He held staff meetings with his managers to talk about the complaint and he encouraged other women to speak in his defence.

48. Mr. Lubbers also wanted to start an investigation into the leaks to the press about the complaint, the investigation and related matters. However, there was little press outside of The Netherlands, his home country. Moreover, the reports in the New York press included erroneous information – obviously, then, not from OIOS or the complainant. His attempted inquiries into the press reports is an ill-disguised attempt to prevent other staff from speaking with OIOS and, in fact, were perceived by many UNHCR staff as retaliatory action since he demanded to know who had spoken with OIOS and why Mrs. Brzak had not been

asked to resolve her complaint strictly within UNHCR by those staff with whom she had consulted about the case. Of course, Mrs. Brzak was entirely within her rights as a UN staff member to report her complaint to OIOS.

49. Additionally, on 28 May, although the investigation was not yet completed as he was well aware, Mr. Lubbers issued a note to all UNHCR staff, both at HQ and in the field, referring to the complainant in this case, and also to another very vulnerable female staff member, clearly trying to put his own "spin" on the case and presenting it as fact. OIOS believes that this second woman is the person Mr. Lubbers had referred to when asked by OIOS whether there were any other cases. During the interview, Mr. Lubbers refused to identify this woman so Mr. Lubbers' version of their interaction cannot be verified. Moreover, the underlying message of his note to all staff was clearly identified by a senior manager in UNHCR who described the message as telling UNHCR staff to "shut up". Further, a number of staff including the complainant saw the note as an effort to silence them and anyone else who might wish to come forward as well as to blame others for his current problems without acknowledging his own role.

VI. Findings

50. Misconduct may take a variety of forms. In this case, Mr. Lubbers treated a female staff member with serious disrespect of her person and her position, by

forcing unwanted attention of a sexual nature on her. The Staff Rules provide that misconduct includes "specific instances of prohibited conduct" such as "any form of discrimination or harassment, including sexual and gender harassment, as well as physical or verbal abuse at the workplace or in connection with work". [Staff Rule 101.2(d)].

51. In this case, the misconduct was of a sexual nature and may also be considered to be sexual harassment which the UN has defined as follows:

52. *[. . .] any unwelcome sexual advance, request for sexual favours or other verbal or physical conduct of a sexual nature, when it interferes with work, is made a condition of employment or creates an intimidating, hostile or offensive work environment. It is particularly serious when behaviour of this kind is engaged in by any official who is in a position to influence the career or employment conditions (including hiring, assignment, contract renewal, performance, evaluation or promotion) of the recipient of such attention. [ST/AI/379]*

53. In this case, OIOS found that the allegations of misconduct and abuse of authority against Mr. Lubbers are credible and substantiated for the following reasons:

54. *First*, the only witnesses to the incident as described by Mrs. Brzak are two managers of UNHCR, both subordinate to Mr. Lubbers. One of them recalls two incidents of touching where Mr. Lubbers put his arm around her waist while the other does not

confirm even the touching which has been acknowledged by Mr. Lubbers himself. The intensity of the efforts of Mr. Lubbers, including issuing a message to all UNHCR staff which seeks to discredit the complainant in this case, attempting to identify those who cooperated with the OIOS inquiry, and meeting with key witnesses during the investigation, clearly was intended as a message to all UNHCR staff that providing information to the Investigators would have negative repercussions for them. As noted by a senior UNHCR manager, the message was clearly to "shut up". These are not the actions of a person who seeks only to ascertain the facts of a case.

55. *Second*, although not agreeing with all the details of Mrs. Brzak's report of the incident, Mr. Blatter confirms that Mr. Lubbers twice touched Mrs. Brzak's waist, and even described it as "overly familiar". Until so advised of this evidence of Mr. Blatter by OIOS, Mr. Lubbers had denied touching Mrs. Brzak; he then only admitted to doing so whilst ushering her out in what he described as "a polite manner". Nevertheless, Mr. Blatter does confirm that touching in an "overly familiar" manner occurred, and given the efforts of Mr. Lubbers to discourage cooperation, Mr. Blatter's statement goes some way to support the complaint. Moreover, the pattern of Mr. Lubbers' misconduct seems clear and demonstrates that the touching of Mrs. Brzak was not isolated but part of how Mr. Lubbers conducts himself with women whom he finds attractive, regardless of the impropriety of such conduct, the distress caused to

the women involved, or the disparity in the positions held.

56. *Third*, Mrs. Brzak is a UNHCR staff member who enjoys respect from her colleagues and OIOS found no indication of a male fide complaint or a motive to conclude that she fabricated her story. Even Mr. Lubbers describes her as "brutally frank". That she did not get the post in Mr. Lubbers' office nor win the Staff Council election, the reasons posited by Mr. Lubbers, are not linked to an action by Mr. Lubbers which would create a motive to strike back at him. Indeed, she said that she had applied for the post of Chef de Cabinet thinking that she had the qualities and experience that the post called for. Others have verified that she was simply responding to an invitation issued by Mr. Lubbers at a meeting attended by several hundred staff shortly after he joined UNHCR. At that meeting, as confirmed by the then Chef de Cabinet, Mr. Lubbers indicated that he would not be bound by the usual bureaucratic personnel rules. As for the Staff Council post, Mr. Lubbers had no influence over that election.

57. *Fourth*, as is often the case in sexual harassment complaints, there are no independent witnesses. As such, evidence must be adduced which tends to show the respective credibility of the principals. In this case, the evidence shows that from the date of the incident until April 2004 when she reported the incident formally to OIOS and the IGO, Mrs. Brzak met with UNHCR staff members, including IGO staff members, and others to seek their advice as to how

best to proceed, or even whether to proceed or not. The information gathered in the OIOS interviews – of UNHCR staff and other persons from whom she sought guidance – confirmed that from 18 December 2003 to April 2004, she has been consistent in her reporting of the details of the incidents, including in her interviews with OIOS, that she has not expressed hostility but only embarrassment and that she has been anxious about how such a complaint would be handled. Moreover, given the actions of Mr. Lubbers since 6 May, her concerns were well placed.

58. On the other hand, as noted above, Mr. Lubbers' actions undermine his denials. He has undertaken multiple steps to affect the outcome of the investigation in his favour and to interfere with normal investigative processes which now seem designed to hide the pattern of misconduct stated in this report and to prevent others from providing information. His discussion of the case with his Director, DHRM and his Chef de Cabinet may well have influenced their statements when later provided to OIOS. Mr. Sultan-Khan, for reasons not difficult to understand, particularly in the light of Mr. Lubbers's actions, decided to play it safe by claiming that he did not see anything. Other UNHCR staff told OIOS that they were afraid to discuss the case for fear of retaliation. Given the continuing actions of Mr. Lubbers, that concern is well placed and OIOS will monitor the situation to ensure that no staff who cooperated will be negatively affected for so doing.

59. Similarly, as regards the two incidents between Mr. Blatter and Mrs. Brzak, it is equally understandable why Messrs. Hegenauer, Mir, or Vanniasingam would give equivocal support to the report of Mrs. Brzak. They too decided to take the safe route. Again, none denied the events she related but their responses indicated that they were aware that providing evidence in support of the allegations by Mrs. Brzak would have serious consequences not only for Mr. Blatter, but also, more importantly, for Mr. Lubbers, given that Mrs. Brzak alleged that Mr. Blatter was imitating the actions of Mr. Lubbers – not to mention their own careers. As the 28 May note from Mr. Lubbers makes clear, according to a senior UNHCR manager, Mr. Lubbers wanted staff to "shut up".

VII. Conclusions and recommendations

60. It is the view of OIOS that not only did Mr. Lubbers engage in serious acts of misconduct in that he foisted unwanted physical attention of a sexual nature on a subordinate female staff member but also that he extensively and intentionally abused his authority as High Commissioner in his intense, pervasive and intimidating attempts to influence the outcome of the investigation. Seen as part of a pattern of such conduct, these actions demonstrate that the most senior officer in UNHCR lacks the requisite integrity.

61. OIOS considers that there should be a distinction between the actions of Mr. Lubbers and those of Mr. Blatter. While it is indisputable that the actions of Mr. Lubbers constitute misconduct by touching with a clear intent to embarrass and humiliate Mrs. Brzak, this is not quite so clear in the case of Mr. Blatter.

62. While improper, the actions of Mr. Blatter rather suggest that Mr. Blatter – who was described by most interviewees as a playful person – might not have had a clear intent to harass Mrs. Brzak, but rather to joke about events which he had witnessed.

63. Finally, it is hoped that swift follow-up action on the findings of this current investigation will signal to UNHCR staff members, and to UN staff generally, that they may cooperate with an OIOS investigation, and indeed, may file good faith allegations with OIOS without fear of retaliation by their senior managers.

64. OIOS makes the following recommendations in view of the findings of this investigation:

1. It is recommended that appropriate action be taken against Mr. Lubbers for misconduct in that he engaged in unwanted touching of a female member of staff, for interfering with the investigation and for issuing a message to UNHCR staff members which was both intimidating and embarrassing to the complainant and at least one other female staff member. [IV/04/133/01]

2. It is recommended that appropriate action be taken against Mr. Blatter for inappropriate comments to a female member of staff and for failing to protect that staff member as required by his duties as head of the human resources department of UNHCR. [IV/04/133/02

3. It is recommended that the findings of this report be shared in general with UNHCR staff, to the same extent as has been Mr. Lubbers' message to staff [IV/04/133/03]

4. It is recommended that any retaliatory actions against staff who cooperated with this investigation be reported to OIOS. [IV/04/133/04]

5. It is recommended that the Under-Secretary-General for Management undertake a review of the protection measures afforded to women staff at UNHCR against sexual harassment. [IV/04/133/05]

Dileep Nair
Under-Secretary-General
for Internal Oversight Services
2 June 2004

165 (D)

No. 09-1481

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CYNTHIA BRZAK, et al.,

Petitioners,

—v.—

THE UNITED NATIONS, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT THE UNITED NATIONS IN OPPOSITION TO THE PETITION

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QUESTIONS PRESENTED

1. Whether the Second Circuit correctly held that the immunity regime created by three treaties ratified by the United States, two federal statutes, and over sixty years of uniform case law in United States courts, which confers absolute immunity on the United Nations, and functional immunity on its former high officials, compels dismissal of Petitioners' employment-related claims for lack of subject matter jurisdiction.

2. Whether the Second Circuit correctly held the recognition of the immunities at issue in this case by the political branches in treaty and statute fully comport with the U.S. Constitution.

PARTIES

Petitioners are Cynthia Brzak and Nasr Ishak. Respondent submitting this Brief in Opposition is the United Nations ("UN" or "Organization"), asserting immunities on behalf of itself and defendants Kofi Annan, Ruud Lubbers, and Wendy Chamberlin. Werner Blatter, Kofi Asomani, Raymond Hall, A.-W. Bijleveld, and Daisy Buruku were initially named as defendants in the United States District Court for the Southern District of New York, but with Petitioners' consent, were dismissed with prejudice for Petitioners' failure to effect service.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	vi
JURISDICTION	1
TREATY AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
A. The Immunities of the United Nations and Its Officials.	2
B. The Role of the Secretary-General	4
C. The UN's Internal Justice System.	5
D. Proceedings Below.	9
REASONS FOR DENYING THE WRIT	15
I. There Is No Conflict Among the Circuits Regarding the Law on the Immunities of the United Nations and Its Former High Officials.	15

PAGE

A. The Decision Below Does Not Conflict With the Law of Any Court in the United States. 15

B. The Decision Below Follows Easily From the Plain Language of the Applicable Treaties and Statutes. 19

C. These Treaties and Statutes Reflect Considered Policy Determinations By the Executive and Legislative Branches That Must Be Respected. 25

II. The Immunities at Issue Confront No Constitutional Bar, and No Court in the United States Has Suggested Otherwise. 30

CONCLUSION 33

SUPPLEMENTAL APPENDIX

Vienna Convention on Diplomatic Relations art. 39, *opened for signature* Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95, *entered into force for the United States* Dec. 13, 1972 ..... 1a

PAGE

Letter from N. Michel, Legal Counsel to the United Nations, to A. D. Wolff, Deputy Permanent Representative of the United States of America to the United Nations, May 15, 2006 ..... 3a

Letter from N. Michel, Legal Counsel to the United Nations, to J. R. Bolton, Permanent Representative of the United States of America to the United Nations, Oct. 19, 2006 ..... 10a

Letter from M. J. Garcia, United States Attorney for the Southern District of New York, to Hon. Robert W. Sweet, United States District Judge, Oct. 2, 2007 ..... 17a

Letter from M. J. Garcia, United States Attorney for the Southern District of New York, to Hon. Robert W. Sweet, United States District Judge, Oct. 31, 2007 ..... 25a

TABLE OF AUTHORITIES

Cases PAGE

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Ashkir v. United Nations, No. 97-2266, 1998 U.S. Dist. LEXIS 3814 (D.D.C. Mar. 19, 1998) 16, 32

Atkinson v. Inter-American Development Bank, 156 F.3d 1335 (D.C. Cir. 1998) .. 22

BedRoc Ltd., LLC v. United States, 541 U.S. 176 (2004) 20

Boimah v. United Nations General Assembly, 664 F. Supp. 69 (E.D.N.Y. 1987) 17

Broadbent v. Organization of American States, 628 F.2d 27 (D.C. Cir. 1980) 27

Christopher v. Harbury, 536 U.S. 403 (2002) 32

Corrinet v. Ginns, No. C 97-0142, 1997 WL 282149 (N.D. Cal. May 22, 1997) 17

County of Westchester v. Ranollo, 67 N.Y.S.2d 31 (N.Y. City Ct. 1946) 18, 19

Curran v. City of New York, 77 N.Y.S.2d 206 (N.Y. Sup. Ct. 1947), *aff'd*, 88 N.Y.S.2d 924 (N.Y. App. Div. 2d Dep't 1949) 17, 19

PAGE

D'Cruz v. Annan, No. 05 Civ. 8918, 2005 WL 3527153 (S.D.N.Y. Dec. 22, 2005) 23

De Luca v. United Nations Organization, 841 F. Supp. 531 (S.D.N.Y. 1994), *aff'd*, 41 F.3d 1502 (2d Cir. 1994) 20, 25

Dostal v. Haig, 652 F.2d 173 (D.C. Cir. 1981) 18, 19, 31

Emmanuel v. United States, 253 F.3d 755 (1st Cir. 2001) 16

FDIC v. Meyer, 510 U.S. 471 (1994) 25

Hamrick v. Bush, No. 1:06-CV-00044, 2007 WL 1655874 (E.D. Ark. June 4, 2007).. 16

Hunter v. United Nations, No. 106796/04, 2004 WL 3104829 (N.Y. Sup. Ct. Nov. 15, 2004) 19, 22, 27

In re Dinastia, L.P., 381 B.R. 512 (S.D. Tex. 2007) 17

Inversora Murten, S.A. v. Energoprojekt-Niskogradnja Co., Ltd., 264 F. App'x 13 (D.C. Cir. 2008) 17, 22

McGehee v. Albright, 210 F. Supp. 2d 210 (S.D.N.Y. 1999)..... 23

Medellín v. Texas, 552 U.S. 491 (2008) 20

Mendaro v. World Bank, 717 F.2d 610 (D.C. Cir. 1983) 24, 26, 28

PAGE

Nicol v. United Nations Missions in Liberia, No. 09-1800, 2009 WL 2370179 (E.D. Pa. July 30, 2009) 16

Osman v. Annan, No. 07-00837-CV-W-NKL, 2008 U.S. Dist. LEXIS 46667 (W. D. Mo. June 16, 2008) 16

Oss Nokalva, Inc. v. European Space Agency, No. 08-3169, 2009 WL 2424702 (D.N.J. Aug. 6, 2009) 22

People of New York v. Coumatos, 224 N.Y.S.2d 507 (N.Y. Ct. Gen. Sess. 1962) 18, 19

Polak v. International Monetary Fund, 657 F. Supp. 2d 116 (D.D.C. 2009) 22

Sabbithi v. Al Saleh, 605 F. Supp. 2d 122 (D.D.C. 2009) 20, 32

Samantar v. Yousuf, No. 08-1555, 2010 WL 2160785 (U.S. June 1, 2010) 21

Taiwan v. United States District Court for the Northern District of California, 128 F.3d 712 (9th Cir. 1997) 17

Tenney v. Brandhove, 341 U.S. 367 (1951) 18

Tonya K. v. Board of Education of the City of Chicago, 847 F.2d 1243 (7th Cir. 1988) 1

Tuck v. Pan American Health Organization, 668 F.2d 547 (D.C. Cir. 1981) 32

PAGE

Van Aggelen v. United Nations, 311 F. App'x 407 (2d Cir. 2009) 16, 20, 32

Veiga v. World Meteorological Organization, No. 08-3999-cv, 2010 WL 726518 (2d Cir. Mar. 3, 2010) 31

Weinstock v. Asian Development Bank, No. 105-CV-00174, 2005 WL 1902858 (D.D.C. July 13, 2005) 31

Statutes and Treaties

28 U.S.C. § 517 1

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2403(a) 1

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Convention on the Privileges and Immunities of the United Nations, Feb. 13, 1946, 21 U.S.T. 1418, *acceded to by the United States* Apr. 29, 1970 ..... 2, 3, 4, 5, 14, 28

Diplomatic Relations Act of 1978, 22 U.S.C. §§ 254a–254e (1978) 4

Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602–1611 (1976) 21

International Organizations Immunity Act, 22 U.S.C. §§ 288–288l (1945) 4

PAGE

Vienna Convention on Diplomatic Relations, *opened for signature* Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95, *entered into force for the United States* Dec. 13, 1972 ..... 1, 3

Other Authorities

Exec. Ord. No. 9,698, 11 Fed. Reg. 1,809 (Feb. 19, 1946) 4

G.A. Res. 42/219, U.N. Doc. A/RES/42/219 (Dec. 21, 1987) 4

G.A. Res. 59/283, U.N. Doc. A/RES/59/283 (Apr. 13, 2005) 7

G.A. Res. 62/228, U.N. Doc. A/RES/62/228 (Feb. 6, 2008) 8, 9

G.A. Res. 63/253, U.N. Doc. A/RES/63/253 (Mar. 17, 2009) 9

G.A. Res. 351(IV), art. 7(2) (Dec. 9, 1949) .. 7

Judgment No. 560, *Claxton* (U.N. Admin. Trib. 1992), U.N. Doc. AT/DEC/560 (June 30, 1992) 7

Judgment No. 707, *Belas-Gianou* (U.N. Admin. Trib. 1995), U.N. Doc. AT/DEC/707 (July 28, 1995) 7

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PAGE

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JURISDICTION

The United States Court of Appeals for the Second Circuit entered judgment on March 2, 2010. Petitioners invoked the jurisdiction of this Court under 28 U.S.C. § 1254(1) by filing a petition for a writ of certiorari on June 1, 2010. If, as Petitioners suggest, their assertion of constitutional challenges to federal statutes should be certified to the Attorney General under 28 U.S.C. § 2403(a), that requirement has been satisfied by the District Court's invitation to the United States to "brief the issue of immunity," App. 17, in response to which, and pursuant to 28 U.S.C. § 517, the United States Attorney for the Southern District of New York submitted letters dated October 2 and October 31, 2007 (reprinted in the Supplemental Appendix ("Supp. App.") at 17a and 25a, respectively). *See, e.g., Tonya K. v. Bd. of Educ.*, 847 F.2d 1243, 1247 (7th Cir. 1988) (statute satisfied where "[t]he Executive Branch . . . has actual notice of the case and has had time to exercise its right to intervene").

TREATY AND STATUTORY PROVISIONS INVOLVED

In addition to the treaties and statutes cited and quoted by Petitioners, the Second Circuit also applied the Vienna Convention on Diplomatic Relations art. 39, *opened for signature* Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95, *entered into force for the United States* Dec. 13, 1972, Supp. App. 1a, to dismiss Petitioners' complaint for lack of subject matter jurisdiction. *See* App. 9–11, 21.

STATEMENT OF THE CASE

A. The Immunities of the United Nations and Its Officials.

Article 105 of the Charter of the United Nations, June 26, 1945, 59 Stat. 1031 (1945), *ratified* Aug. 8, 1945 ("Charter"), provides that the United Nations "shall enjoy . . such privileges and immunities as are necessary for the fulfillment of its purposes," and that UN officials "shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connexion with the Organization." In 1946, as the Charter contemplated, the General Assembly adopted the Convention on Privileges and Immunities of the United Nations ("General Convention"), to which 157 states, including the United States, have become parties. *See* General Convention, Feb. 13, 1946, 21 U.S.T. 1418, *acceded to by the United States* Apr. 29, 1970; United Nations Treaty Collection, *Status of General Convention*, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-1&chapter=3&lang=en (last visited July 1, 2010) ("*Status of General Convention*").

The General Convention defines the privileges and immunities of the Organization and its officials. As to the Organization, the treaty provides that "[t]he United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity." General Convention art. II, § 2. As to the Organization's officials, the treaty provides all UN

officials with immunity "from legal process in respect of words spoken or written and all acts performed by them in their official capacity," *id.* art. V, § 18(a), and grants the Secretary-General and all officials serving at the level of Assistant Secretary-General and above ("high officials") the same "privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law." General Convention art. V § 19. These diplomatic immunities are in turn specified by Articles 31 and 39 of the Vienna Convention on Diplomatic Relations ("VCDR"). By virtue of the VCDR, current high officials have absolute immunity, and former high officials enjoy continuing immunity "with respect to acts performed . . . in the exercise of [their] functions." VCDR, art. 39(2), Supp. App. 1.

By acceding to the General Convention, each party agrees that "when an instrument of accession is deposited on behalf of any Member, the Member will be in a position under its own law to give effect to the terms of this Convention." General Convention final art., § 34. The United States acceded to the General Convention in 1970. *Status of General Convention, supra* at 2. When presenting the treaty to the Senate for its advice and consent, the Executive Branch explained that "[i]t is clear from the language of the convention, and from precedents involving similar provisions in other treaties to which the U.S. is a party, that the convention is self-executing; therefore no implementing legislation is necessary." S. EXEC. REP. NO. 91-17, at 16 (1970); *see also id.* at 5 (Senate Committee on Foreign Relations confirming self-executing character of General Convention).

In addition, the International Organizations Immunity Act, 22 U.S.C. §§ 288-288l (1945) ("IOIA"), grants the UN "the same immunity from suit and every form of judicial process as is enjoyed by foreign governments," and provides UN officials with "immun[ity] from suit and legal process relating to acts performed by them in their official capacity and falling within their functions." 22 U.S.C. §§ 288a(b), 288d(b); *see* Exec. Ord. No. 9,698, 11 Fed. Reg. 1,809 (Feb. 19, 1946) (designating the United Nations an international organization covered by the IOIA). The Diplomatic Relations Act of 1978, 22 U.S.C. §§ 254a-254c (1978) ("DRA"), requires dismissal of suits against officials who are immune under the VCDR "or under any other laws extending diplomatic privileges and immunities." 22 U.S.C. § 254d.

B. The Role of the Secretary-General.

The Secretary-General is the chief administrative officer of the United Nations, Charter art. 97, and is thus "the focal point in promoting and ensuring the observance of the privileges and immunities of [UN] officials . . . by using all such means as are available to him." G.A. Res. 42/219, ¶ 11, U.N. Doc. A/RES/42/219 (Dec. 21, 1987). Section 20 of the General Convention provides the Secretary-General with "the right and the duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations." The treaty further provides that the United Nations "shall cooperate at all times with the appropriate authorities of Members to facilitate the proper administration of justice, secure the

observance of police regulations and prevent the occurrence of any abuse in connection with the [applicable] privileges, immunities and facilities." General Convention art. V § 21.

The practice of the Secretary-General in exercising his authority has been clear, consistent, and responsible. With respect to functional immunity, when a state seeks to prosecute or when a civil suit is filed against an official, the Secretary-General first determines whether the acts in question were performed in the course of official duties. If they were not, he will inform the local authorities that functional immunity does not attach. If the act has some connection to official duties, the Secretary-General will waive the immunity if he determines that continued immunity would impede the course of justice, and the immunity can be waived without prejudice to the UN's interests. *See, e.g.*, *Report of the Secretary-General on information-sharing practices between the United Nations and national law enforcement authorities, as well as referrals of possible criminal cases related to United Nations staff, United Nations officials and experts on mission*, ¶¶ 19-22, U.N. Doc. A/63/331 (Aug. 25, 2008) ("*Report of the Secretary-General*").

C. The UN's Internal Justice System.

Section 29 of the General Convention requires the Organization to "make provisions for appropriate modes of settlement of . . . [d]isputes involving any official of the United Nations who by reason of his official position enjoys immunity, if immunity has not been waived by the Secretary-

General." Consistent with Section 29, the Staff Regulations promulgated by the UN General Assembly, and the Staff Rules promulgated by the Secretary-General, provide that employment-related claims shall be pursued through the UN's internal justice system. *See Staff Rules: Staff Regulations of the United Nations and Staff Rules 100.1 to 112.8*, Ch. XI, U.N. Doc. ST/SGB/2002/1 (Jan. 1, 2002), *as most recently updated by* U.N. Doc. ST/SGB/2009/6 (May 27, 2009) & U.N. Doc. ST/SGB/2009/7 (Oct. 21, 2009).

Under the former system, in effect during the period relevant to Petitioners' claims, the administration of sexual harassment claims was governed by the Administrative Instruction entitled "Procedures for Dealing with Sexual Harassment," U.N. Doc. ST/AI/379 (Oct. 29, 1992). Staff members alleging sexual harassment could make a written complaint to the Assistant Secretary-General for Human Resources Management, who was required to launch a prompt investigation into the allegations. *Id.* ¶¶ 8-9. If the Assistant Secretary-General concluded that the allegation of misconduct could not be sustained, the complainant was entitled to request review by the Secretary-General. *See* Staff Regulation 11.1; Staff Rule 111.2(a). If the Assistant Secretary-General concluded that the allegation of misconduct could not be sustained, the complainant was entitled to request review by the Secretary-General. *See* Staff Regulation 11.1; Staff Rule 111.2(a). If the Secretary-General declined to grant the requested relief, the complainant could then file an appeal with a Joint Appeals Board ("JAB"), which heard challenges to

administrative decisions and recommended dispositions to the Secretary-General. Staff Regulation 11.1; Staff Rule 111.1. A complainant dissatisfied with the JAB's recommendation and the Secretary-General's subsequent decision could initiate appeal proceedings before the United Nations Administrative Tribunal ("Administrative Tribunal"), an independent judicial body appointed directly by the General Assembly. Statute of the United Nations Administrative Tribunal, G.A. Res. 351(IV), art. 7(2) (Dec. 9, 1949), *as most recently amended by* G.A. Res. 59/283, U.N. Doc. A/RES/59/283 (Apr. 13, 2005).

The Administrative Tribunal, the highest adjudicative authority in the former system, repeatedly emphasized "the responsibility of the Organization to address" claims of sexual harassment "promptly and effectively." Judgment No. 1043, *Mink*, Judgment No. 1043 ¶ II, U.N. Doc. AT/DEC/1043 (July 23, 2002); *accord Belas-Gianou*, Judgment No. 707 ¶ IX, U.N. Doc. AT/DEC/707 (July 28, 1995). It characterized sexual harassment as "a form of prohibited gender-based discrimination," and held that the UN was obliged to examine the facts and circumstances of any case alleging sexual harassment "carefully and thoroughly," in order "to determine what, if anything, occurred and whether [the alleged conduct] constituted sexual harassment." *Claxton*, Judgment No. 560 ¶ VIII, U.N. Doc. AT/DEC/560 (June 30, 1992). Affirming that "the United Nations Charter, action by the General Assembly, and the Tribunal's jurisprudence make it crystal clear that the terms of appointment of every staff member include the

right to be free from invidious gender-based discrimination by any official of the Organization," the Administrative Tribunal noted that the UN has "strong interests in protecting staff rights," and equally strong interests "in protecting itself against the consequences of their abrogation through misconduct by officials." *Id.* ¶¶ VI-VII.

A Secretary-General's Bulletin issued on February 11, 2008 ("Bulletin") reaffirmed the Organization's commitment to policies against discrimination, harassment, and abuse of authority, such as retaliation against employees reporting misconduct. U.N. Doc. ST/SGB/2008/5. Unifying the anti-discrimination and anti-harassment policies of the United Nations in a single document, the Bulletin sets out an unequivocal standard for addressing employees' claims, explicitly stating that the Organization has a "zero tolerance" policy toward sexual harassment, and seeks to provide its employees with a safe and secure workplace. *Id.* ¶ 4.2. The Bulletin's objectives are advanced by investigative and disciplinary systems designed to function expeditiously.

As the United Nations, with the court's permission, advised the Second Circuit at oral argument, the UN's internal justice system recently has been strengthened. Transcript of Oral Argument at 21-22, *Brzak v. United Nations*, 597 F.3d 107 (May 29, 2009) (No. 08-2799-cv). For example, as of July 1, 2009, the UN Dispute Tribunal ("UNDT") replaced the JAB, and the UN Appeals Tribunal ("UNAT") was instituted as the highest decision-making body in the internal justice system. *See* G.A. Res. 62/228, ¶ 39, U.N.

Doc. A/RES/62/228 (Feb. 6, 2008); G.A. Res. 63/253, ¶ 27, U.N. Doc. A/RES/63/253 (Mar. 17, 2009). These tribunals are staffed with professional judges appointed by the General Assembly on the recommendation of the UN Internal Justice Council, a five-member body composed of one representative each from staff and management, two "distinguished external jurists" nominated by staff and management, and "a distinguished jurist chosen by consensus by the four other members" to serve as chair. U.N. Doc. A/RES/62/228 ¶¶ 36, 40. Both the UNDT and the UNAT are empowered to hear appeals of administrative decisions relating to employees' employment and may order rescission, specific performance, or compensation, and costs. U.N. Doc. A/RES/63/253, Annex I, Statute of the United Nations Dispute Tribunal arts. 2(1), 10(5); U.N. Doc. A/RES/63/253, Annex II, Statute of the United Nations Appeals Tribunal art. 9(1)-(2).

D. Proceedings Below.

After filing a motion with this Court for leave to file an original bill of complaint, which was denied without opinion, Pet. 1, and a complaint before the United States Equal Employment Opportunity Commission, which was dismissed for lack of jurisdiction, Pet. 5-6, Petitioners filed a complaint in the Southern District of New York against the UN and certain of its officials, alleging sexual discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964, violations of the civil provisions of the Racketeer Influenced and Corrupt Organizations Act, and intentional infliction of emotional distress and intentional battery in violation of state law. *See* Compl. ¶¶ 27-

59, *Brzak v. United Nations*, 551 F. Supp. 2d 313 (S.D.N.Y. May 4, 2006) (No. 06-cv-03432).

According to the complaint, Petitioners Cynthia Brzak and Nasr Ishak worked for the Office of the United Nations High Commissioner for Refugees ("UNHCR") in Geneva. Petitioners alleged that on December 18, 2003, at the end of a meeting held in the office of Ruud Lubbers and in front of other staff members, Mr. Lubbers "placed his hands on Plaintiff Brzak's waist, pulled her back towards him, pushed his groin into her buttocks and held her briefly in that position before releasing her." Compl. ¶ 19. Petitioners further alleged that Ms. Brzak filed a complaint against Mr. Lubbers and another official before the Office of Internal Oversight Services, and was consequently subjected to retaliation at work, including dissemination of her identity as a complainant, open hostility from co-workers, withholding of annual performance evaluations, verbal harassment, threats against her career, and refusal by her supervisors to assign work and responsibilities commensurate with her position. *Id.* ¶¶ 22-23. Petitioners further alleged that because Mr. Ishak urged Ms. Brzak to file a complaint, he failed to be promoted. *Id.* ¶ 24. The complaint made no specific allegations of harassment or retaliation by Mr. Annan or Ms. Chamberlin. *See id.* ¶ 25.

At the time of the acts alleged in the Complaint, Mr. Annan was Secretary-General of the UN, Mr. Lubbers was the UN High Commissioner for Refugees, and Ms. Chamberlin was a senior official in the Office of the UNHCR. *Id.* ¶¶ 10–12. None of these individuals was employed by the

United Nations at the time the District Court considered the assertions of immunity.

At least initially, Petitioners made use of the UN's internal dispute resolution mechanisms. Compl. ¶¶ 22, 23, 25; *see also* Supp. App. 8a, 15a. When review by the Secretary-General of a series of administrative decisions in her case failed to provide her with relief, Ms. Brzak exercised her right to institute an appeal against those administrative decisions, but then elected to withdraw the appeal before her submissions were complete. Compl. ¶ 25; Supp. App. 8a, 15a. Mr. Ishak has pursued his case in the UN's internal dispute system, and on July 12, 2007, the JAB concluded that his rights were violated by a lack of transparency in the promotion process. Joint App. at 173, *Brzak v. United Nations*, 597 F.3d 107 (Sept. 3, 2008) (No. 08-2799-cv). He was awarded three months' net salary in compensation. *Id.* at 176.

Petitioners purported to serve their complaint on the UN, but consistent with the Organization's regular practice, the UN formally returned all papers purporting to constitute service at UN Headquarters to the United States Mission to the United Nations. *See* Supp. App. 3a, 10a. The accom-panying letters from the UN Legal Counsel advised that "the United Nations has not waived, and indeed, expressly maintains, the privileges and immunities of the Organization and its current and former officials in respect of the above-mentioned legal proceedings." Supp. App. 9a, 15a-16a.

The UN moved in the District Court to dismiss the complaint in its entirety for lack of subject

matter jurisdiction, asserting immunities on behalf of itself and the remaining defendants, Mr. Annan, Ms. Chamberlin and Mr. Lubbers (the "Former Officials"). *See* App. 23–24 (District Court noting that "[t]he immunity at issue here is a right belonging to . . . the U.N.")[1]. In accordance with the United States's treaty obligations, the United States Attorney for the Southern District of New York submitted two letters to the District Court to explain the applicable immunities and address Petitioners' allegations that the immunities were unconstitutional. Supp. App. 17a, 25a.[2]

After briefing and argument, the District Court granted the motion of the United Nations and dismissed the entire complaint for lack of subject matter jurisdiction. App. 29. The District Court held that the claims against the United Nations should be dismissed because it had not waived its absolute immunity, and those against the Former Officials on the ground of the functional immunity conferred by treaty and statute, because all the claims against them arose in the context of the individuals' employment by the United Nations and related to acts allegedly performed by them

[1] Werner Blatter, Kofi Asomani, Raymond Hall, A.-W. Bijleveld, and Daisy Buruku were initially named as defendants in the United States District Court for the Southern District of New York, but with Petitioners' consent, were dismissed with prejudice for Petitioners' failure to effect service.

[2] Petitioners therefore misrepresent the record by asserting that a single letter simply advised the court of the U.S. Attorney's "intention to refrain from appearing in the action on behalf of the defendant United Nations, or to otherwise intervene on its behalf." Pet. 6.

while exercising their official functions. App. 24–29. The District Court reasoned that the question of whether the alleged acts relate to official functions must be "determined on the basis of whether the acts alleged occurred in the course of an official's exercise of functions, and not on the nature of the underlying conduct." App. 26. Because Petitioners' claims "are addressed against Annan only as a decisionmaker in the internal employment dispute resolution process and against Chamberlin only as a senior supervisor in the office of the UNHCR," the District Court dismissed those claims. App. 28. Equally, the District Court held, the "allegations of sexual harassment and 'indecent battery' against Lubbers are allegations of abuse of authority in the workplace," *id.*, and as such, subject to dismissal as precisely the sort of employment-related issues that "courts have consistently held . . . lie at the core of an international organization's immunity." App. 26. The District Court noted that "[w]hether Lubbers' alleged acts were intended or perceived as sexual in nature may be relevant to their wrongfulness, but not to the determination of functional immunity," App. 28, reasoning that "[i]f the rule were otherwise, routine allegations of wrongful conduct or improper motive would defeat the immunity, and the solid protection that Congress intended to afford international organizations and their officials would indeed be evanescent." App. 29 (omitting internal citation and quotation marks).

Petitioners appealed to the United States Court of Appeals for the Second Circuit. App. 2. After briefing and argument, the Second Circuit upheld Respondents' immunities and affirmed the

dismissal of Petitioners' complaint for lack of subject matter jurisdiction. App. 13. As to the claims against the Organization, the Second Circuit held that the United Nations enjoys absolute immunity under the terms of the General Convention, that it had not expressly waived that immunity, and therefore that "the district court's decision to dismiss the claims against the United Nations was correct." App. 7–8. As to the individual officials, the Second Circuit agreed with the District Court that a court assessing whether a defendant's alleged conduct falls within the scope of functional immunity "must do so without judging whether the underlying conduct actually occurred, or whether it was wrongful." App. 10. On that standard, the Second Circuit affirmed the dismissal of six of the seven claims—those alleging employment discrimination, retaliation, intentional infliction of emotional distress, and RICO violations—on the ground that those claims were based on "allegations with respect to acts that the defendants performed in exercise of their official functions," because they relate to the Former Officials' "roles as United Nations officials" or "their management of the office in which the plaintiffs worked," and "involve personnel management decisions falling within the ambit of the defendants' professional responsibilities." App. 11.

The Second Circuit did not reach the question of whether functional immunity barred the remaining claim, alleging intentional battery, but instead affirmed the dismissal on the alternative ground that there was "no colorable basis" on which the District Court could exert supplemental

jurisdiction over this state law claim when the federal claims had been dismissed before trial on jurisdictional grounds. App. 12.

Petitioners filed a petition for certiorari, which the United Nations here opposes.

REASONS FOR DENYING THE WRIT

I. There Is No Conflict Among The Circuits Regarding the Law on the Immunities of the United Nations and Its Former High Officials.

A. The Decision Below Does Not Conflict With the Law of Any Court in The United States.

Petitioners do not identify any conflict between the decision below and the law of this Court or any other court in the United States. Petitioners do not cite a single case in which a U.S. court has refused to enforce the absolute immunity of the Organization, and Petitioners conceded in their submissions below that U.S. law confers functional immunity on all of the Former Officials for the acts alleged in the complaint:

> Plaintiffs can only lament the fact that the current state of U.S. law, as . . . applied by most American courts faced with an action against the UN or another international organization purporting to enjoy immunity from suit or process, supports the Defendant's assertion [of functional immunity].

Plaintiffs' Mem. Law in Opp. to Mot. of UN to Dismiss at 4, *Brzak v. United Nations*, 551 F. Supp. 2d 313 (S.D.N.Y. Oct. 17, 2007) (No. 06-cv-03432). Petitioners are correct: there is no disagreement among courts in the United States on the applicability and scope of the immunities at issue here, and hence no reason for this Court to grant review.

The decision below falls squarely within a body of authority spanning over six decades from courts in seven circuits that have uniformly recognized and enforced the absolute immunity of the Organization and the functional immunity of its officials. *See, e.g.*, *Van Aggelen v. United Nations*, 311 F. App'x 407, 409 (2d Cir. 2009) (affirming dismissal of action on grounds of immunity conferred by Charter, General Convention, and IOIA); *Emmanuel v. United States*, 253 F.3d 755, 756 n.2 (1st Cir. 2001) (affirming dismissal of action because the "immunity of the United Nations is absolute unless expressly waived"); *Nicol v. United Nations Missions in Liberia*, No. 09-1800, 2009 WL 2370179, at *2–*3 (E.D. Pa. July 30, 2009) (dismissing claims, citing Charter, General Convention, and IOIA); *Osman v. Annan*, No. 07-00837-CV-W-NKL, 2008 U.S. Dist. LEXIS 46667, at *3–*5 (W. D. Mo. June 16, 2008) (dismissing complaint, citing Charter, General Convention, VCDR, and DRA); *Hamrick v. Bush*, No. 1:06-CV-00044, 2007 WL 1655874, at *2 (E.D. Ark. June 4, 2007) ("The United Nations has expressly stated that it is not waiving its immunity so it must be dismissed as a defendant."); *Ashkir v. United Nations*, No. 97-2266, 1998 U.S. Dist. LEXIS 3814, at *6–*7

(D.D.C. Mar. 19, 1998) (dismissing complaint, citing General Convention); *Corrinet v. Ginns*, No. C 97-0142, 1997 WL 282149, at *4 (N.D. Cal. May 22, 1997) (dismissing suit against UN official on basis of General Convention and IOIA); *Boimah v. United Nations Gen. Assembly*, 664 F. Supp. 69, 71 (E.D.N.Y. 1987) (citing General Convention, ordering complaint dismissed unless UN waives immunity); *see also Curran v. City of New York*, 77 N.Y.S.2d 206, 209 (N.Y. Sup. Ct. 1947), *aff'd*, 88 N.Y.S.2d 924 (N.Y. App. Div. 2d Dep't 1949) (given State Department's "recogni[tion] and certifi[cation of] the immunity of the United Nations and the [individual defendant] to judicial process, there is no longer any question for independent determination by this Court"); *Inversora Murten, S.A. v. Energoprojekt-Niskogradnja Co., Ltd.*, 264 F. App'x 13, 15 (D.C. Cir. 2008) ("[T]he immunity conferred upon international organizations by the IOIA is absolute."); *Taiwan v. U.S. Dist. Court for the N. Dist. of Cal.*, 128 F.3d 712, 718 & n.7 (9th Cir. 1997) (IOIA provides functional immunity to employees of international organizations); *In re Dinastia, L.P.*, 381 B.R. 512, 524 (S.D. Tex. 2007) (dismissing complaint, citing IOIA); *Ashford Int'l, Inc. v. World Bank Group*, No. 1:04-CV-3822, 2006 WL 783357, at *2 (N.D. Ga. Mar. 24, 2006) (unless waived, defendant international organizations "are entitled to absolute immunity under the IOIA").

Ignoring this consistent body of authority, Petitioners baldly assert that these immunities are invalid because they "'are not well grounded in history and reason,' nor . . . even properly 'official,'

as the UN is neither a sovereign state nor an arm of any sovereign state." Pet. 9 (citing *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951); *Dostal v. Haig*, 652 F.2d 173, 177 (D.C. Cir. 1981)). As Petitioners concede, however, the cases on which they rely for this proposition discuss "the traditional and historical immunity afforded to *states* and their officials," *id.* (emphasis added), often by judicial decision-making, not the separate and distinct immunities conferred on the United Nations and its officials by treaty and statute. It is thus Petitioners, and not the Second Circuit, who "conflate" the immunity afforded international organizations, Pet. 8, with that afforded to other foreign and domestic actors, under different sources of law, and for different reasons.[3] Hence, the vast majority of the cases cited in Petitioners' brief are entirely inapposite.

In fact, Petitioners cite only two cases in which courts appear to disagree with the Second Circuit's interpretation of these immunities—*People of New York v. Coumatos*, 224 N.Y.S.2d 507, 512 (N.Y. Ct. Gen. Sess. 1962), and *County of Westchester v. Ranollo*, 67 N.Y.S.2d 31, 34 (N.Y. City Ct. 1946), in which state criminal courts declined to dismiss charges on the grounds of the immunity asserted by UN employees. *See* Pet. 15–17. Two decisions from state courts of first instance that are some fifty and sixty-five years

[3] Contrary to Petitioners' assertions, nowhere in the decisions below does the Second Circuit or the District Court invoke or otherwise rely on what Petitioners describe as "the superior doctrine of state sovereign immunity." Pet. 18 n.7 (citing academic commentary discussing immunities granted to federal and state governments or officials within the United States).

old respectively would not, in any event, provide reason to review the considered opinion of the Second Circuit. But *Coumatos* and *Ranollo* were inconsistent with authority at the time, *see Curran*, 77 N.Y.S.2d at 209, and more importantly, neither reflects current law in New York courts. *See, e.g.*, *Hunter v. United Nations*, No. 106796/04, 2004 WL 3104829 at *5 (N.Y. Sup. Ct. Nov. 15, 2004) (upholding the absolute immunity of the United Nations in a suit alleging employment discrimination); *compare Ranollo*, 67 N.Y.S.2d at 32–35 (rejecting official UN driver's assertion of immunity with regard to charge of exceeding speed limit by 10 miles per hour) *with Dostal*, 652 F.2d at 176 (noting that a foreign diplomat, enjoying the same immunities as the officials here, would be "immune from suit even though, for example, he kills or injures a U.S. citizen while recklessly driving a car").

B. The Decision Below Follows Easily From the Plain Language of the Applicable Treaties and Statutes.

There is no conflicting jurisprudence on the relevant immunities because the Second Circuit's decision is a straightforward application of the provisions of the General Convention, the VCDR, the IOIA, and the DRA, which together required the District Court to dismiss Petitioners' Complaint.

As the United States advised the District Court, the provisions of the General Convention "are binding on [U.S.] courts." Supp. App. 20a (Letter of U.S. Att'y S.D.N.Y., Oct. 2, 2007). The Second Circuit concluded, after reviewing the text

and ratification history of the General Convention, as well as the consistent and repeated assertions by the Executive Branch that the treaty is self-executing, that the General Convention "applies in American courts without implementing legislation." App. 7; *see Medellín v. Texas*, 552 U.S. 491, 506 (2008) ("The interpretation of a treaty, like the interpretation of a statute, begins with its text."); *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) (plurality opinion) (A court's "inquiry begins with the statutory text, and ends there as well if the text is unambiguous."). Equally, the provisions of the VCDR have regularly been directly applied by U.S. courts since it entered into force in the United States in 1972. *See, e.g., Sabbithi v. Al Saleh*, 605 F. Supp. 2d 122, 125–26 (D.D.C. 2009); *De Luca v. United Nations Org.*, 841 F. Supp. 531, 534 (S.D.N.Y. 1994), *aff'd*, 41 F.3d 1502 (2d Cir. 1994). Petitioners do not challenge these rulings.

Petitioners also do not directly challenge the propriety of the Second Circuit's application of the absolute immunity of the UN under the General Convention "from every form of legal process except insofar as in any particular case it has expressly waived its immunity." Art. II, § 2 (quoted in Pet. 2); *see Van Aggelen*, 311 F. App'x at 409 (2d Cir. 2009). There has been no express waiver in this case, App. 3, 4 (recitation of undisputed facts); to the contrary, the UN has repeatedly affirmed that it "has not waived, and indeed, expressly maintains, the privileges and immunities of the Organization and its current and former officials in respect of [these] proceedings." Supp. App. 3a, 10a (Letters from UN

Legal Counsel to U.S. diplomatic officials). *See also* App. 8 (Second Circuit rejecting Petitioners' argument, not reprised here, that "purported inadequacies with the United Nations' internal dispute resolution mechanism indicate a waiver of immunity," because "crediting this argument would read the word 'expressly' out of [the Convention]").

Unable to evade the plain language of the General Convention or to show an express waiver, Petitioners argue that recognition of the absolute immunity of the United Nations, and "as a practical matter, for the individual respondents as well," is somehow "contrary to the prevailing law in the United States of the restrictive theory of sovereign immunity." Pet. 16 n.6 (internal citation and quotation marks omitted). They also argue that, if recognized, the UN's immunity should be governed solely by the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605 *et seq.* ("FSIA"), which enacted exceptions to the immunity of foreign states. Pet. 20 n.8.

None of these issues provides occasion for review. *First*, whatever restrictions may be imposed on the immunities of foreign states, the Second Circuit correctly held that the General Convention "unequivocally grants the United Nations absolute immunity without exception." App. 9.[4] Petitioners identify no authority

[4] *Cf. Samantar v. Yousuf*, No. 08-1555, 2010 WL 2160785 at *4 *5 (U.S. June 1, 2010) (explaining that restrictive theory holds that "immunity is confined to suits involving the *foreign sovereign's* public acts, and does not extend to cases arising out of a *foreign state's* strictly commercial acts" and that the "FSIA . . . indisputably governs

suggesting otherwise. *Second*, Petitioners have presented no argument at any stage of this case to support the application of any exception to sovereign immunity, so as the Second Circuit noted, "even under [Petitioners'] interpretation" of applicable law, "the United Nations would still be immune from suit." *Id.* There is no reason for this Court to grant review to examine an argument Petitioners have never made. In any event, every U.S. court to reach the question has held that passage of the FSIA had no effect on the absolute immunity granted to international organizations under the IOIA. *Inversora Murten*, 264 F. App'x at 15; *Atkinson v. Inter-Am. Dev. Bank*, 156 F.3d 1335, 1342 (D.C. Cir. 1998); *Polak v. Int'l Monetary Fund*, 657 F. Supp. 2d 116, 120 (D.D.C. 2009); *Oss Nokalva, Inc. v. European Space Agency*, No. 08-3169, 2009 WL 2424702, at *4 (D.N.J. Aug. 6, 2009).

With respect to the Former Officials, Petitioners similarly do not directly challenge the scope of the functional immunity conferred by treaties and federal statutes upon officials of international organizations, asserting instead in conclusory fashion that the alleged conduct is outside of "official or traditional immunities." Pet. 20 (citing Executive and Legislative immunity). Petitioners have no basis for ignoring as invalid the three treaties, two statutes, and sixty years of case law that form the basis of the immunities conferred

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the determination of whether *a foreign state*," as defined by the act, "is entitled to sovereign immunity") (emphases added, internal citation omitted); *Hunter*, 2004 WL 3104829, at *5 ("[T]he United Nations is not a 'foreign state' as defined in § 1603 of the FSIA.").

upon international organizations and their officials. *See supra* Part I.A.[5] Further, as the District Court and Second Circuit recognized, the immunity scheme provided by the General Convention, the VCDR, the IOIA, and the DRA requires that the immunity of UN officials be determined on the basis of the objective circumstances of the alleged acts—whether they occur in the course of an official's exercise of functions—and not on the nature of the underlying conduct. Otherwise, under the approach urged by Petitioners, any allegation of misconduct would be outside an official's job description and defeat the immunity. The Second Circuit correctly held that in judging whether the Former Officials' alleged conduct falls within the scope of functional immunity, it "must do so without judging whether the underlying conduct

[5] Petitioners are also wrong in their argument, twice rejected below, that recognition of functional immunity in this case is unwarranted because "the United Nations is not a sovereign state and therefore its officials are not diplomatic envoys." Pet. 20 n.8; *see also* Pet. 11, 33. (They concede elsewhere in the Petition, however, that certain current employees of "[t]he United Nations and other international organizations . . . enjoy absolute immunity from such laws as if they were the diplomatic envoys of sovereign states." Pet. 15.). Petitioners' further assertion that "[t]he respondents are not the type of officials customarily afforded immunity," Pet. 9, is equally wrong. The former officials indisputably fall within the category of officials who enjoy absolute immunity while they are in their positions, and functional immunity thereafter. *See* App. 9-10, 21; *D'Cruz v. Annan*, No. 05 Civ. 8918, 2005 WL 3527153, at *1 (S.D.N.Y. Dec. 22, 2005) (holding that current and former UN officials, including one of the named defendants, are immune from employment discrimination and retaliation claims); *accord McGehee v. Albright*, 210 F. Supp. 2d 210, 217-18 (S.D.N.Y. 1999).

actually occurred, or whether it was wrongful," and appropriately affirmed the dismissal of the employment discrimination, retaliation, intentional infliction of emotional distress and RICO violations claims as allegations concerning the employment relationship. App. 10–11.

Finally, the Second Circuit upheld the dismissal of the remaining claim, that of intentional battery, on an alternative ground of lack of subject matter jurisdiction, "without reaching Brzak's argument that the claim involves conduct outside the scope of the defendant's immunity." App. 12. Specifically, the Second Circuit held that "there was no colorable basis for the district court to exercise supplemental jurisdiction over her state law claim" when the federal claims were appropriately dismissed on immunity grounds. *Id.* Petitioners do not challenge that ruling. Hence, contrary to their suggestion, *see* Pet. 19, even if the Court were to grant on either of the questions presented, it would have no basis to consider the question whether the alleged conduct underlying the intentional battery claim falls within the scope of functional immunity.[6]

[6] In any event, the District Court was correct to hold that functional immunity barred Ms. Brzak's battery claim. As the District Court noted, the allegations against Mr. Lubbers of sexual harassment and "indecent battery" in the form of unwanted contact in the course of a meeting within UN offices in Geneva are allegations of "abuse of authority in the workplace." App. 28. Such allegations of abuse of authority are precisely the sort of employment-related issues that "courts have consistently held . . . lie at the core of an international organization's immunity." App. 26; *see Mendaro v. World Bank*, 717 F.2d 610, 615 (D.C. Cir. 1983) ("One of the most important protections granted to international

C. These Treaties and Statutes Reflect Considered Policy Determinations By the Executive and Legislative Branches That Must Be Respected.

The immunities granted to the United Nations and its officials under the General Convention, which are mirrored in U.S. statutes, reflect considered policy decisions by the 157 states that have acceded to the treaty, including the United States, that the Organization cannot fulfill its mandate without these protections. These policy considerations—constitute the object and purpose of the treaty, confirm the correctness of the Second Circuit's rejection of Petitioners' arguments, and should not be thrown into question by this Court.

International organizations would be simply unable to function independently if they or their

organizations is immunity from suits by employees of the organization in actions arising out of the employment relationship."). Petitioners also misstate the decision below when they contend that the Second Circuit ruled that "the individual respondents' tortious behavior . . . must be ultimately reviewed by the [trial] court after at least some preliminary discovery to see to what degree of immunity, if any, it is entitled." Pet. 17 n.6. In fact, after affirming dismissal of the battery claim without considering Ms. Brzak's immunity argument, the Second Circuit noted that if she re-files in state court, "the state court would need to adjudicate *in the first instance* the defendant's claim of immunity." App. 12 (emphasis added). *See FDIC v. Meyer*, 510 U.S. 471, 475 (1994) (immunity doctrine is jurisdictional in nature); *accord* Supp. App. 20a (Executive Branch's explanation that "these immunities . . . are intended to shield the UN and its officials from the burdens of litigation, [so] the question of immunity should be decided at the outset, as a jurisdictional matter"), *De Luca*, 841 F. Supp. at 533 n.1.

officials were subject to the jurisdiction of domestic courts in the countries in which they operate. The national laws of the many states in which the UN operates will vary widely, often conflicting with the laws of other Member States, or even offending their fundamental policies. Likewise, the legal systems of those many states will also vary widely, both in procedure and, at least in the view of some Member States, reliability and impartiality. For example, even where there may be agreement on a specific norm, the procedures by which it is enforced in a particular legal system may be viewed by other states as burdensome, unfair, or misguided as a matter of policy, and the sanctions and remedies available may also reflect widely varying approaches.

One of the primary purposes of the General Convention is thus to "give the [UN], in every Member State, a sufficient degree of sovereignty in regard to its own affairs to enable it to carry out its functions" with independence and impartiality. Official Records of the First Part of the First Session of the General Assembly, Plenary Meetings of the General Assembly, Verbatim Record 10 January–14 February 1946, at 452 (remarks of the United Kingdom representative, urging adoption of resolution proposing General Convention). *Accord Mendaro*, 717 F.2d at 616 ("the very structure of an international organization . . . requires that the organization remain independent from the intranational policies of its individual members").

These objectives apply with special force to disputes arising from UN officials' employment.

Given the wide range of issues and approaches, in few if any areas will the variety of national laws be greater than in employment regulation. Given the potential for employee grievances in any organization employing over 100,000 persons worldwide, in few if any areas would the potential administrative burden of defending against employee complaints in national courts be greater. *See Broadbent v. Org. of Am. States*, 628 F.2d 27, 35 (D.C. Cir. 1980) ("Denial of immunity" for employment claims against international organizations "opens the door to divided decisions of the courts of different member states passing judgment on the rules, regulations, and decisions of the international bodies . . . [thereby] [u]ndercutting uniformity in the application of staff rules . . . [and] undermin[ing] the ability of the organization to function effectively."); *Hunter*, 2004 WL 3104829, at *4 ("an international organization's self regulation of its employment practices is an activity essential to the 'fulfillment of its purposes,' and thus an area to which immunity must extend") (quoting Charter art. 105).

Petitioners' argument that "[t]here is no compelling jurisprudential or policy reason why a collection of states acting through an international organization should require substantially broader immunity than its member states enjoy when they act alone," Pet. 8, fails to acknowledge any of these considerations. Moreover, their contention has been explicitly rejected by U.S. courts, which have emphasized that "the United Nations is not a foreign state," *Hunter*, 2004 WL 3104829, at *5, that its

activities "are designed to resolve problems spanning national boundaries, with a benefit to be reaped collectively by [its] member nations," *Mendaro*, 717 F.2d at 619, and that its immunities are "rooted in the need to protect international organizations from unilateral control by [any particular] member nation over [such activities] within its territory." *Id.* at 615.

Petitioners also disregard the fact that the UN's immunity from civil suit in domestic courts is not immunity from liability, and does not mean that any and all criminal activity will escape sanction. *See* Pet. 18–19. In addition to granting immunity, the General Convention also requires the UN to provide "appropriate modes of settlement of . . . disputes involving any official . . . who by reason of his official position enjoys immunity" that has not been waived. General Convention art. VIII § 29. Employee complaints are addressed through the alternative dispute resolution procedures made available in the internal justice system.[7] *See supra* at 5 9. Moreover, the treaty directs the UN to "cooperate at all times" with domestic law enforcement to "prevent the occurrence of any abuse in connection with" these immunities, General Convention art. V § 20, and requires the Secretary-General "to waive the immunity of any

[7] These internal mechanisms for the resolution of employment-related claims were in place at the time of the events underlying Petitioners' complaint, and were used by Petitioners, at least initially. *See supra* at 11. Petitioners' own experience thus belies their argument that "[t]here is simply no alternative forum" for their claims, Pet. 24, and that "the immunity granted under the Convention and the IOIA . . . closes off all avenues of relief for a party in [their] position." Pet. 23.

official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to [the UN's] interests," *id.* § 21.[8] *See supra* at 4–5.

In acceding to the General Convention, and passing domestic legislation to enforce international organization immunities, the Executive and Legislative Branches have determined that absolute and functional immunities are necessary to secure the independence of the UN and its officials from regulation under national law, and relieve them of exposure to litigation in U.S. courts. *See, e.g.*, S. Exec. Rep. No. 91-17, at 8 (1970) (even before accession to the treaty,

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[8] Petitioners' assertion that the decision below "would lead to the absolute bar of criminal action or resulting civil process even when an international organization official commits or condones rape or murder on U.S. soil," Pet. 18, thus misrepresents not only the UN's obligations under the General Convention, but also the official policy of the Organization and its record of responsible cooperation with national authorities. *See, e.g., Report of the Secretary-General*, ¶¶ 12–13, 25 (explaining that "credible allegations that reveal that a crime may have been committed by United Nations officials . . . are ordinarily brought to the attention of the Member State having jurisdiction over the alleged conduct," and that the Secretary-General will waive the individuals' immunity if it will not prejudice the UN's interests); Press Release, UN News Centre, *Acting on new Oil-for-Food report, Annan lifts official's immunity, pledges further steps* (Aug. 8, 2005), http://www.un.org/apps/news/printnewsAr.asp?nid=15662; Press Release, U.S. Att'y S.D.N.Y., *U.S. Judge Sends Former High-Ranking United Nations Official to Prison for Money Laundering* (Oct. 12, 2007), www.justice.gov/usao/nys/pressreleases/October07/kuznetsovsentencingpr.pdf (thanking "the United Nations Office of Legal Affairs and Office of Investigative Oversight Services for their cooperation").

"[m]any of these privileges and immunities [we]re already enjoyed under the [IOIA] and under the headquarters agreement between the United States and the [UN]"); *see also id.* at 12 ("[T]he convention is on solid ground in making clear that the immunities are granted so that the [UN] can operate effectively" and in "requir[ing] the [UN] to cooperate in facilitating the administration of justice . . . ."). Petitioners are simply unhappy with the basic policy judgments made by the Executive and Legislative Branches that are reflected in the General Convention and the federal statutes applicable here. That unhappiness provides no reason to grant review.

II. The Immunities at Issue Confront No Constitutional Bar, and No Court in the United States Has Suggested Otherwise.

Faced with the settled framework of immunity created by three ratified treaties, two federal statutes, and consistent enforcement by courts for over sixty years, Petitioners ask this Court to grant review in order to consider whether that framework comports with the right to access the courts guaranteed by the First, Fifth, and Fourteenth Amendments and the prohibition on the taking of private property without compensation imposed by the Fifth Amendment. Pet. 10, 12, 22–32. Petitioners provide no basis on which this Court might do so.

Petitioners assume that they have a right to pursue their claims in a U.S. court, and that any doctrine that defeats that right—even if otherwise lawful—is unconstitutional. *See, e.g.*, Pet. 25–26 (asserting putative property right in claims). As

the Second Circuit explained, however, "[e]ach of these arguments fails, as each does no more than question why immunities in general should exist." App. 12. There is no reason for this Court to consider that question, for, as the Second Circuit also observed, "immunities of one sort or another . . . are firmly embedded in American law." *Id.* As the United States advised the District Court, if dismissal on grounds of Respondents' immunities violated the Constitution, "no form of immunity would be constitutionally permissible—an absurd result given that concepts of immunity are well-established fixtures of our law and essential, in particular, for the conduct of international relations." Supp. App. 27a.

Petitioners cite no case that challenges this settled understanding. Specifically, Petitioners cite no case in which any court has held that the immunities granted to the United Nations or its officials—or indeed, any international organization—compromise constitutional protections. This inability to find case support is unsurprising, as courts have routinely refused to entertain any constitutional challenge to these and other immunities. *See Veiga v. World Meteorological Org.*, No. 08-3999-cv, 2010 WL 726518, at *1 (2d Cir. Mar. 3, 2010) (quoting App. 12–13); *Weinstock v. Asian Dev. Bank*, No. 105-CV-00174, 2005 WL 1902858 (D.D.C. July 13, 2005) ("It is axiomatic that Congress can limit the jurisdiction of the lower federal courts. . . . One method . . . which it employs quite frequently, is to provide by statute that . . . certain entities are immune from suit in the district courts."); *see also Dostal*, 652 F.2d at 176 ("due process is not infringed by the proper enjoyment of immunities derived from lawful

sources"); *Sabbithi*, 605 F. Supp. 2d at 129 ("Plaintiffs' constitutional claims must also give way to defendants' diplomatic immunity."). In some cases, courts have ignored such meritless arguments entirely. *See* App. 24–30; *Van Aggelen*, 311 F. App'x at 409 (upholding dismissal of employment action against the UN and its officials on immunity grounds, and rejecting remaining arguments, including those invoking the First, Fifth, and Fourteenth Amendments, as "without merit"); *Tuck v. Pan Am. Health Org.*, 668 F.2d 547, 549–50 (D.C. Cir. 1981) (upholding immunity granted under IOIA without addressing Fifth and Fourteenth Amendment claims).

The cases Petitioners do cite provide no support for their arguments. *First*, the law governing the immunities of the United States, its political subdivisions, and their officials, *see* Pet. 10–11, 29 n.10, is irrelevant to the immunities conferred on the UN and its former officials, which are governed by the treaties and statutes discussed above. *See supra* at 1–5, 15; *Van Aggelen*, 311 F. App'x at 409; *Ashkir*, 1998 U.S. Dist. LEXIS 3814, at *3–*4. *Second*, Petitioners seek to avoid the implications of the cases it cites by ignoring or misrepresenting their holdings. For example, Petitioners contend that "this case provides the ideal forum . . . to finally resolve the access-to-courts issue that *Christopher* [*v. Harbury*, 536 U.S. 403 (2002)] described as being unsettled." Pet. 24; *see also* Pet. 22 (asserting that "*Christopher* recognized that the right to access courts is still 'unsettled'," citing 536 U.S. at 415 n.12). In the very passage Petitioners cite, however, this Court reaffirmed that the right (if not its precise textual basis) was already well

settled, and emphasized that there is no breach if there is no viable underlying claim. 536 U.S. at 415 (emphasis added, internal citation omitted); *see also id.* at 413 nn. 7–8 (citing cases decided by this Court and several Circuits between 1956 and 1998).

Petitioners ask this Court to grant review in order to rule that the United States cannot accede to treaties conferring immunities; that Congress cannot pass domestic statutes recognizing these immunities; and that these treaties and statutes are therefore unenforceable in American courts. These frivolous contentions provide no basis for this Court's review. *See* App. 12–13; *see also* Supp. App. 27a.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

DONALD FRANCIS DONOVAN
Counsel of Record
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Counsel for the United Nations

July 6, 2010

SUPPLEMENTAL APPENDIX

Vienna Convention on Diplomatic Relations art. 39, *opened for signature* Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95, *entered into force for the United States* Dec. 13, 1972

Article 39

1. Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the receiving State on proceeding to take up his post or, if already in its territory, from the moment when his appointment is notified to the Ministry for Foreign Affairs or such other ministry as may be agreed.

2. When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist.

3. In case of the death of a member of the mission, the members of his family shall continue to enjoy the privileges and immunities to which they are entitled until the expiry of a reasonable period in which to leave the country.

4. In the event of the death of a member of the mission not a national of or permanently resi-

dent in the receiving State or a member of his family forming part of his household, the receiving State shall permit the withdrawal of the movable property of the deceased, with the exception of any property acquired in the country the export of which was prohibited at the time of his death. Estate, succession and inheritance duties shall not be levied on movable property the presence of which in the receiving State was due solely to the presence there of the deceased as a member of the mission or as a member of the family of a member of the mission.

[Letterhead of United Nations]

15 May 2006

Excellency,

Motion for Leave to File a Complaint in an Original Action in the Supreme Court of the United States—Cynthia Brzak and Nasr Ishak v. United Nations, et al.

Complaint in the United States District Court for the Southern District of New York—Cynthia Brzak and Nasr Ishak v. United Nations, et al.

I write to inform you that the United Nations has received, via courier, the above "Motion for Leave to File a Complaint in an Original Action in the Supreme Court of the United States" filed by Ms. Cynthia Brzak and Mr. Nasr Ishak against the United Nations, et al.

In addition, it has been brought to our attention that Ms. Brzak and Mr. Ishak have also filed the above-mentioned Complaint in the United States District Court for the Southern District of New York, a copy of which is enclosed.

His Excellency
Mr. Alejandro D. Wolff
Deputy Permanent Representative of the United States of America to the United Nations
New York, NY

With the present letter, I hereby return the original affidavit of service and proof of service with respect to the Motion for Leave to File a Complaint in an Original Action in the Supreme Court of the United States, and request the competent United States authorities to take appropriate action to ensure respect for the privileges and immunities of the Organization and its current and former officials, in accordance with the obligations of the United States under both international and United States law.

As you are aware, the United Nations is an international inter-governmental organization established pursuant to the Charter of the United Nations (hereinafter referred to as "the UN Charter"), a multilateral treaty signed on 26 June 1945. The UN Charter was ratified by the United States of America on 8 August 1945 and came into force in the United States on 28 October 1945. *See* UN Charter, 59 Stat. 1031 (1945), *reprinted* in 1945 U.S. Code Cong. & Admin. News, 961 et seq.

Pursuant to Article 105, paragraph 1 of the UN Charter, "[t]he Organization shall enjoy in the territory of each of its Members such privileges and immunities that are necessary for the fulfillment of its purposes." Article 105, paragraph 3 stipulates that "[t]he General Assembly may make recommendations with a view to determining the details of the application of paragraph 1 . . . of this Article or may propose conventions to the Members of the United Nations for this purpose." UN Charter, Art. 105, 1945 U.S. Code Cong. & Admin. News, at 985.

In order to give effect to Article 105 of the UN Charter, the General Assembly of the United

Nations adopted the Convention on the Privileges and Immunities of the United Nations (hereinafter, "the General Convention") on 13 February 1946. 1 U.N.T.S. 15 (1946). The United States of America acceded to the General Convention on 29 April 1970. 21 U.S.T, at 1418; [1970] TIAS No. 6900.

With respect to the privileges and immunities of the organization, Article II, Sections 2 and 3, of the General Convention provide:

> "SECTION 2. The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution."
>
> "SECTION 3. The premises of the United Nations shall be inviolable. The property and assets of the United Nations, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation and any other form of interference whether by executive, administrative, judicial or legislative action."

Before ratifying the General Convention, the United States of America enacted the International Organizations Immunities Act ("IOIA"). Pub.L.No. 291, 79th Cong., 1st Sess., 29 December 1945 (codified at 22 U.S.C. § 288 *et seq.*). In accordance with the provisions of Title I, Section 1 of the IOIA, 22 U.S.C § 288, the President of the United States in 1946 designated the United Nations as an "international organization" enti-

tled to the privileges and immunities, facilities and exemptions specified in the IOIA, Ex. Ord. No. 9698, 11 F.R., 1809 (19 Feb. 1946).

Pursuant to Article V, Section 19 of the General Convention, the Secretary-General, Mr. Kofi Annan, and the former Under-Secretary-General, Mr. Ruud Lubbers, both of whom are named as defendants in the above proceedings, enjoy "the privileges and immunities, exemptions and facilities accorded to diplomat envoys, in accordance with international law." Pursuant to Article 31 of the Vienna Convention on Diplomatic Relations (hereinafter, "the Vienna Convention"), 500 UNTS 95 (18 April 1961), which entered into force with respect to the United States on 13 December 1972, 23 U.S.T. 3227; TIAS No. 7502, diplomatic envoys enjoy immunity from criminal, civil and administrative jurisdiction of the host country.

Under United States law, any action brought against an individual entitled to immunity under the Vienna Convention must be dismissed. Pursuant to 22 U.S.C.A, Section 254(d):

> "Any action or proceeding brought against an individual who is entitled to immunity with respect to such action or proceeding under the Vienna Convention on Diplomatic Relations, under Section 254(b) or 254(c) of this Title, or under any other laws extending diplomatic privileges and immunities, shall be dismissed. Such immunity may be established upon motion or suggestion by or on behalf of the individual, or as otherwise permitted by law or applicable rules of procedure" (emphasis added).

In addition to the diplomatic immunities under the Vienna Convention enjoyed by the Secretary-General, Mr. Kofi Annan and the former Under-Secretary-General, Mr. Ruud Lubbers, they and the other current and former officials of the Organization named in the proceedings, particularly Wendy Chamberlin, Werner Blatter, Kofi Asomani, Raymond Hall, A.-W.Bijleveld, Daisy Buruku, pursuant to Article V, Section 18(a) of the General Convention, are "immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity". Under Section 34 of the General Convention, the Government of the United States is under obligation to be "in a position under its own law to give effect to the terms" of the General Convention.

As you are no doubt aware, the Courts of the United States have consistently recognized the privileges and immunities of the United Nations and its officials. (*See, e.g., Baley v. United Nations* 159 F. 3d 1345, 1998 WL 536759 (2d Cir. (N.Y.)); *Corrinet v. United Nations, et. al.*, No. 95-CV-00426-SAW, slip op. (N.D. Cal. September 17, 1996), *aff'd*, No. 96-17130, slip op. (9th Cir. August 28, 1997), *cert. denied* 522 U.S. 1091, 118 S.Ct. 882 (1998); and *DeLuca v. United Nations, et al.*, 841 F. Supp. 531, *aff'd*. 41 F.3d 1502 (2d Cir. 1994, *cert. denied* 514 U.S. 1135, 115 S.Ct. 1429 (1995). In addition, the United States Supreme Court has previously denied a motion to bring an original action in that Court against the Secretary-General of the United Nations. *See Corriner v. Boutros Ghali*, 516 US. 1039, 116 S.Ct. 694(mem.), 133 L. Ed. 2d 653 (1996).

Regarding the legal action brought by Ms. Brzak and Mr. Ishak, it should be noted that all of the acts alleged against the Organization and its current and former officials by the plaintiffs concern their employment with the United Nations. In this respect, pursuant to Article 101, paragraph 1 of the UN Charter, the staff of the Organization are appointed under regulations established by the General Assembly. Article XI of the Staff Regulations of the United Nations provides procedures for the exclusive remedy concerning allegations of non-observance of the terms and conditions of employment with the United Nations.

In accordance with Article XI of the Staff Regulations of the United Nations, Ms. Brzak requested a review of the administrative decision in her case, and on 18 October 2004, filed an appeal with the Geneva Joint Appeals Board. However, by letter dated 3 November 2004, Ms. Brzak's counsel advised the Geneva Joint Appeals Board of Ms. Brzak's decision to withdraw her appeal.

Mr. Ishak has also availed himself of the above-referenced procedures to file an appeal in connection with his claim that the Organization failed to observe the terms and conditions of his employment with the Office of the United Nations High Commissioner for Refugees. His appeal remains pending.

Thus, Ms. Brzak and Mr. Ishak are not devoid of a remedy to address their grievances. Indeed, both of them availed themselves of the recourse procedures established under the United Nations Regulations to address their claims.

Based on the foregoing, I wish to advise that the United Nations has not waived, and indeed, expressly maintains, the privileges and immunities of the Organization and its current and former officials in respect of the above-mentioned legal proceedings. As such, I herewith return the affidavit of service of the Plaintiff's Motion for Leave to File a Complaint in an Original Action in the Supreme Court of the United States.

In addition, I respectfully request the Government of the United States to take appropriate steps to ensure that the privileges and immunities of the United Nations and its current and former officials are respected in relation to these actions.

Please accept, Excellency, the assurances of my highest consideration.

/s/ N. MICHEL
Nicolas Michel
Under-Secretary-General for
Legal Affairs
The Legal Counsel

cc: Mr. William K. Suter
Clerk of the United States Supreme Court
One First Street, N.E.
Washington, D.C. 20543

Honorable Robert W. Sweet
United States District Judge
United States District Court for the
Southern District of New York
Daniel Patrick Moynihan United States
Courthouse
500 Pearl Street, Room 1920
New York, NY 10007-1312

[LETTERHEAD OF UNITED NATIONS]

19 October 2006

Excellency,

Complaint in the United States District Court for the Southern District of New York—Cynthia Brzak and Nasr Ishak v. United Nations, et al, Docket No. 06 CV 3432

Further to my letter of 15 May 2006 addressed to His Excellency, Mr. Alejandro D. Wolff (copy attached) I write to inform you that on 18 October 2006 the United Nations received a summons to appear in a civil case before the United States District Court for the Southern District of New York in the above-mentioned matter. With the present letter, I hereby return the documents sent to the United Nations and request the United States to take appropriate action to ensure respect for the privileges and immunities of the Organization and its current and former officials in accordance with the obligations of the United States under both her national and United States law.

His Excellency
Mr. John R. Bolton
Permanent Representative of the United States
to the United Nations
New York

As you are aware, the United Nations is an international inter-governmental organization established pursuant to the Charter of the United Nations (hereinafter referred to as "the UN Charter"), a multilateral treaty signed on 26 June 1945. The UN Charter was ratified by the Government of the United States of America on 8 August 1945 and came into force in the United States on 28 October 1945. *See* UN Charter, 59 Stat. 1031 (1945), *reprinted* in 1945 U.S. Code Cong. & Admin. News, 961 et seq.

Pursuant to Article 105, paragraph 1 of the UN Charter, "[t]he Organization shall enjoy in the territory of each of its Members such privileges and immunities that are necessary for the fulfillment of its purposes." Article 105, paragraph 3 stipulates that "[t]he General Assembly may make recommendations with a view to determining the details of the application of paragraph 1 . . . of this Article or may propose conventions to the Members of the United Nations for this purpose." UN Charter, Art. 105, 1945 U.S. Code Cong. & Admin News, at 985.

In order to give effect to Article 105 of the UN Charter, the General Assembly of the United Nations adopted the Convention on the Privileges and Immunities of the United Nations (hereinafter, "the General Convention") on 13 February 1946. 1 U.N.T.S. 15 (1946), General Convention, Art. II, 21 U.S.T. at 1422. The United States of America acceded to the General Convention on 29 April 1970. 21 U.S.T. at 1418; [1970] TIAS No. 6900.

With respect to the privileges and immunities of the Organization, Article II, Sections 2 and 3, of the General Convention provide:

> "SECTION 2. The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution."
>
> "SECTION 3. The premises of the United Nations shall be inviolable. The property and assets of the United Nations, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation and any other form of interference whether by executive, administrative, judicial or legislative action."

Before ratifying the General Convention, the United States of America enacted the International Organizations Immunities Act ("IOIA"). Pub.L.No.291, 79th Cong., 1st Sess., 29 December 1945 (codified at 22 U.S.C. § 288 *et seq.*). In accordance with the provisions of Title I, Section 1 of the IOIA, 22 U.S.C § 288, the President of the United States in 1946 designated the United Nations as an "international organization" entitled to the privileges and immunities, facilities and exemptions specified in the IOIA, Ex. Ord. No. 9698; 11 F.R. 1809 (19 Feb. 1946).

Pursuant to Article V, Section 19 of the General Convention, the Secretary-General, Mr. Kofi

Annan, and the former Under-Secretary-General, Mr. Ruud Lubbers, both of whom are named as defendants in the above proceedings, enjoy "the privileges and immunities, exemptions and facilities accorded to diplomatic envoys in accordance with international law." Pursuant to Article 31 of the Vienna Convention on Diplomatic Relations (hereinafter, "the Vienna Convention"), 500 UNTS 95 (18 April 1961), which entered into force with respect to the United States on 13 December 1972, 23 U.S.T. 3227; TIAS No. 7502, diplomatic envoys enjoy immunity from criminal, civil and administrative jurisdiction of the host country.

Under United States law, any action brought against an individual entitled to immunity under the Vienna Convention must be dismissed. Pursuant to 22 U.S.C.A, Section 254(d):

> "Any action or proceeding brought against an individual who is entitled to immunity with respect to such action or proceeding under the Vienna Convention on Diplomatic Relations, under Section 254(b) or 254(c) of this Title, or under any other laws extending diplomatic privileges and immunities, shall be dismissed. Such immunity may be established upon motion or suggestion by or on behalf of the individual, or as otherwise permitted by law or applicable rules of procedure" (emphasis added).

In addition to the diplomatic immunities under the Vienna convention enjoyed by the Secretary-General Mr. Kofi Annan and the former Under Secretary-General, Mr. Ruud Lubbers, they and the other current and former officials of the Orga-

nization named in the proceedings, particularly Wendy Chamberlin, Werner Blatter, Kofi Asomani, Raymond Hall, A.-W.Bijleveld, Daisy Buruku, pursuant to Article V, Section 18(a) of the General Convention, are "immune from legal process in respect of words spoken or written, and all acts performed by them in their official capacity". Under Section 34 of the Geneva Convention, the Government of the United States is under obligation to be "in a position under its own law to give effect to the terms" of the General Convention.

As you are no doubt aware, the Courts of the United States have consistently recognized the privileges and immunities of the United Nations and its officials. (*See, e.g., Baley v. United Nations* 159 F. 3d 1345, 1998 WL 536759 (2d Cir. (N.Y.)); *Corrinet v. United Nations, et. al.*, No. 95-CV-00426-SAW, slip op. (N.D. Cal. September 17, 1996), *aff'd.* No. 96-17130, slip op. (9th Cir. August 28, 1997), *cert. denied* 522 U.S. 1091, 118 S.Ct. 882 (1998); and *Deluca v. United Nations, et al.*, 841 F. Supp. 531, *aff'd.* 41 F.3d 1502 (2d Cir. 1994, *cert. denied* 514 U.S. 1135, 115 S.Ct. 1429 (1995). In addition, the United States Supreme Court has previously denied a motion to bring an original action in that Court against the Secretary-General of the United Nations. *See Corriner v. Boutros Ghali*, 516 U.S. 1039, 116 S.Ct. 694(mem.), 133 L. Ed. 2d 653 (1996).

Regarding the legal action brought by Ms. Brzak and Mr. Ishak, it should be noted that all of the acts alleged against the Organization and its current and former officials by the plaintiffs concern

their employment with the United Nations. In this respect, it should be noted that pursuant to Article 101, paragraph 1 of the UN Charter, the staff of the Organization are appointed under regulations established by the General Assembly. Chapter XI of the Staff Regulations of the United Nations provides procedures for the exclusive remedy concerning allegations of non-compliance with the terms and conditions of employment with the United Nations.

In accordance with Article XI of the staff Regulations of the United Nations, Ms. Brzak requested a review of the administrative decisions in her case, and on 18 October 2004, filed an appeal with the Geneva Joint Appeals Board. However, by letter dated 3 November 2004, Ms. Brzak's counsel advised the Geneva Joint Appeals Board that Ms. Brzak had decided to withdraw her appeal.

Mr. Ishak has also availed himself of the above-mentioned procedures to file an appeal in connection with his claim that the organization failed to observe the terms and conditions of his employment with the office of the United nations High Commissioner of Refugees. His appeal remains pending.

Thus, Ms. Brzak and Mr. Ishak are not without a remedy to address their grievances. Indeed, both of them availed themselves of the procedures established under United Nations Regulations to address their claims.

As such, I wish to advise that the United Nations has not waived, and indeed, expressly

maintains, the privileges and immunities of the Organization and its current and former officials in respect of the above-mentioned legal proceedings. Accordingly, I herewith return the summons, complaint and certification of service, and respectfully request the Government of the United States to take the appropriate steps to ensure that the privileges and immunities of the United Nations and its current and former officials are maintained in respect of these actions.

Please accept, Excellency, the assurances of my highest consideration.

/s/ N. MICHEL
NICOLAS MICHEL
Under-Secretary-General for
Legal Affairs
The Legal Counsel

Enclosure.

[LETTERHEAD OF U.S. DEPARTMENT OF JUSTICE
UNITED STATES ATTORNEY
SOUTHERN DISTRICT OF NEW YORK]

October 2, 2007

BY HAND
The Honorable Robert W. Sweet
United States District Judge
Daniel Patrick Moynihan United States
Courthouse
500 Pearl Street, Room 1920
New York, New York 10007-1312

Re: *Brzak, et al. v. United Nations, et al.*,
06 Civ. 3432 (RWS)

Dear Judge Sweet:

Pursuant to 28 U.S.C. § 517, the United States respectfully submits this letter in connection with the above-referenced case, brought against the United Nations ("U.N.") and several former U.N. officials. In accordance with the United States' treaty obligations to respect the immunities of the U.N. and its officials, we explain those immunities herein, and we further relay to the Court the U.N. Secretary-General's position on the application of those immunities to the plaintiffs' allegations.[1]

[1] 28 U.S.C. § 517 provides that the "Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States."

I. Background

Plaintiffs filed their complaint on May 4, 2006. *See* Complaint (attached hereto at Tab A). According to the complaint, plaintiffs—Cynthia Brzak, a citizen of the United States, and Nasr Ishak, a French and Egyptian national—are both employed by the Office of the U.N. High Commissioner for Refugees ("UNHCR"), located in Geneva, Switzerland. *See id.* ¶¶7-8. Brzak alleges that she was grabbed in a sexual manner by defendant Ruud Lubbers at the conclusion of a business meeting in Lubbers' office in Geneva in December 2003. *See id.* ¶19. Lubbers was the U.N. High Commissioner for Refugees at the time and remained in that capacity until February 2005. *See id.* ¶11. Brzak alleges that she sought advice on how to respond to the alleged incident from plaintiff Ishak (who worked in the UNHCR Inspector General's office), and that Ishak advised Brzak to file a complaint with the U.N.'s Office of Internal Oversight Services ("OIOS"). *See id.* ¶21. Brzak filed an OIOS complaint on April 27, 2004. *See id.* ¶22. Thereafter, she alleges, Lubbers and other superiors retaliated against her by, among other things, displaying open hostility toward her, verbally harassing her, and giving her unmanageable work assignments. *See id.* ¶¶23, 25. Ishak similarly claims that, after it became known that he had counseled Brzak to file an OIOS complaint, he was not given a promotion for which he had been recommended, and that Lubbers attempted to abolish the office to which Ishak was attached. *See id.* ¶24. Plaintiffs allege that the OIOS issued a report that confirmed Brzak's allegations, but that the report's findings were subsequently rejected

by the U.N. Secretary-General, who was Kofi Annan at the time. *See id.* ¶¶ 22, 25. According to the complaint, Brzak filed a formal appeal from the Secretary-General's decision within the U.N.'s internal dispute resolution system, *see id.*,[2] but the complaint does not indicate that Brzak pursued the appeal process to completion. Nor does the complaint indicate whether plaintiff Ishak availed himself of the U.N.'s internal dispute resolution system to any extent.

Plaintiffs assert causes of action principally under Title VII, as well as causes of action for intentional infliction of emotional distress, indecent battery, and civil RICO violations. *See id.* ¶¶ 27-59. The U.N. itself and eight individual U.N. officials were initially named as defendants. *See id.* ¶¶ 9-17. By letter dated July 11, 2007, plaintiffs represented to the Court that they had effected service on four defendants—the U.N., Kofi Annan, Ruud Lubbers, and Wendy Chamberlin, who was Deputy U.N. High Commissioner for Refugees at the time of the events in question (but who no longer holds that position). Plaintiffs' letter further stated that they did not intend to proceed against the other defendants named in the complaint. Accordingly, the Court dismissed the case

[2] The U.N. has an internal dispute resolution system pursuant to the Charter of the United Nations, June 26, 1945, 59 Stat. 1031 (entered into force Oct. 24, 1945), which specifies that "the staff of the Organization are appointed under regulations established by the General Assembly," *id.* art. 101, para. 1, and Chapter XI of the Staff Regulations of the United Nations, which provides procedures for resolving and redressing allegations of employee misconduct.

with prejudice as against those defendants by order dated July 24, 2007.

II. Interest of the United States

The United States' interest in the immunity issues presented by this case arises from the nation's treaty obligations—which are binding on its courts—to respect the applicable immunities of the U.N. and its officials. *See generally Tachiona v. United States*, 386 F.3d 205, 212 (4th Cir. 2004) ("A corollary to the executive's power to enter into treaties is its obligation to ensure that the United States complies with them."). These immunities arise from the Charter of the United Nations, June 26, 1945, 59 Stat. 1031 (entered into force Oct. 24, 1945) ("U.N. Charter"), and the Convention on Privileges and Immunities of the United Nations, *adopted* Feb. 13, 1946, 21 U.S.T. 1418, 1 U.N.T.S. 16 (entered into force Sept. 17, 1946; for the United States April 29, 1970) (the "General Convention")—both treaties to which the United States is a party. Because these immunities, where applicable, are intended to shield the U.N. and its officials from the burdens of litigation, the question of immunity should be decided at the outset, as a threshold jurisdictional matter. *See De Luca v. United Nations Organization*, 841 F. Supp. 531, 533 (S.D.N.Y. 1994) ("Properly invoked immunity shields a defendant not only from the consequences of litigation's results, but also from the burden of defending themselves.") (internal quotation marks and citation omitted); *see also Tuck v. Pan American Health Org.*, 668 F.2d 547, 549 (D.C. Cir. 1981) ("This shield would

be lost if the merits of a complaint were fully tried before the immunity question was addressed."); *cf. NYSA-ILA Pension Trust Fund ex rel. Bowers v. Garuda Indonesia*, 7 F.3d 35, 39 (2d Cir. 1993) (holding that, before applying "any other rule of law in a case involving a foreign state," the foreign state's immunity must be addressed as a threshold matter).

Pursuant to the foregoing treaties, the U.N. itself is absolutely immune from suit and legal process absent an express waiver. The U.N. Charter provides that the United Nations "shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes." U.N. Charter, art. 105(1). The General Convention fleshes out these privileges and immunities, providing in relevant part that "[t]he United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity." General Convention, art. II, § 2. The U.N. has not expressly waived its immunity with respect to this case. To the contrary, it has explicitly affirmed its immunity by letters addressed to the United States' Ambassador to the U.N. dated May 15, 2006 and October 19, 2006 (attached hereto at Tabs B and C, respectively).

The General Convention also governs the immunity of U.N. officials. In particular, the General Convention grants the Secretary-General and all Assistant Secretaries-General -- which include both the High Commissioner and Deputy High

Commissioner for Refugees—"the privileges and immunities . . . accorded to diplomatic envoys, in accordance with international law." General Convention, art. V, § 19. The privileges and immunities accorded to diplomatic envoys are specified in turn by the Vienna Convention on Diplomatic Relations, *done* Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95 (entered into force for the United States Dec. 13, 1972) ("VCDR"). Under the VCDR, diplomatic officials sued after leaving office continue to receive immunity "with respect to acts performed . . . in the exercise of [their] functions." *Id.* art. 39(2).[3]

Under U.S. law, it is for the Court to decide the applicability of these immunities.[4] However, in

[3] Beyond these treaty provisions specifically applicable to the Secretary General and Assistant Secretaries-General, the General Convention also provides that U.N. officials generally, whether current or former, are immune from suit and legal process "in respect of words spoken or written and all acts performed by them in their official capacity." General Convention art. V, § 18(a). Similarly, under the International Organizations Immunities Act, 22 U.S.C. §§ 288 *et seq.*, the officers and employees of any international organization covered by the statute, including the U.N., receive immunity from suit and legal process as to "acts performed by them in their official capacity and falling within their functions as such . . . officers, or employees." 22 U.S.C. § 288d(b).

[4] U.S. courts have broadly interpreted the immunity of officials of international organizations, particularly in the employment context, in the interest of protecting the autonomy of such organizations concerning their own internal affairs. *See Broadbent v. Organization of American States*, 628 F.2d 27, 34-35 (D.C. Cir. 1980); *Mendaro v. World Bank*, 717 F.2d 610, 615-16 (D.C. Cir.1983); *see also, e.g., Van Aggelen*, No. 06 Civ. 8240(LBS), 2007 WL 1121744, at *2

accordance with its treaty obligations to communicate the views of the Secretary-General, *see* Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission of Human Rights, 1999 I.C.J. 62, 87-88, *available at* 1999 WL 33210678 (Apr. 29, 1999), the United States hereby conveys to the Court the position of the Secretary-General that the three remaining individual defendants are entitled to immunity in this matter. *See* U.N. Letters attached at Tabs B and C. The International Court of Justice has advised that the Secretary-General's views concerning the scope of immunity owed to U.N. officials should normally be accorded a high degree of deference. *See id.* at 87; *cf. Leutwyler v. Office of Her Majesty Queen Rania Al-Abdullah*, 184 F. Supp. 2d 277, 287 (S.D.N.Y. 2001) (noting similar treatment accorded to views of foreign governments concerning the immunities of their officials). The United States is not taking a position on the applicability of official-acts immunity to any of the allegations in this case.

III. Conclusion

The U.N.'s immunity and the individual defendants' official-acts immunities are governed by the principles set forth above. The United States respectfully requests that this letter be docketed

(S.D.N.Y. Apr. 12, 2007); *D'Cruz v. Annan*, No. 05 Civ. 8918 (DC), 2005 WL 3527153, at *1 (S.D.N.Y. Dec. 22, 2005); *Hunter v. United Nations*, 800 N.Y.S.2d 347 (table), 2004 WL 3104829, at *2, *5 (N.Y. Sup. 2004). On the other hand, official-acts immunity does not encompass purely private conduct. *See People v. Leo*, 407 N.Y.S.2d 941, 944 (N.Y. Crim. Ct. 1978).

and made a part of the record of this proceeding. The United States reserves the right to file a supplemental letter in response to any submissions made by the parties on this issue.

Respectfully,

MICHAEL J. GARCIA
United States Attorney for the
Southern District of New York

By: /s/ Serrin Turner
SERRIN TURNER
Assistant U.S. Attorney

Encls.

cc: Monika Ona Bileris, Esq. (by email)
Donald Donovan, Esq. (by email)

[LETTERHEAD OF U.S. DEPARTMENT OF JUSTICE
UNITED STATES ATTORNEY
SOUTHERN DISTRICT OF NEW YORK]

October 31, 2007

BY HAND
The Honorable Robert W. Sweet
United States District Judge
Daniel Patrick Moynihan United States
Courthouse
500 Pearl Street, Room 1920
New York, New York 10007-1312

Re: *Brzak, et al. v. United Nations, et al.*,
06 Civ. 3432 (RWS)

Dear Judge Sweet:

On October 2, 2007, the United States submitted a letter in this matter pursuant to 28 U.S.C. § 517 in order to advise the Court of the immunities afforded to the United Nations ("U.N.") and its officials under certain treaty and statutory provisions. On the same date, the U.N. moved to dismiss on immunity grounds. On October 16, 2007, plaintiffs filed a memorandum in opposition to the U.N.'s motion, contending principally that if the Court were to determine that the action should be dismissed on immunity grounds, such a dismissal would "violate the plaintiffs' fundamental rights under the U.S. Constitution found in the 1st, 5th, 7th and 14th amendments." Pls.' Mem. at 5. The United States submits the instant letter in order to respond, briefly, to plaintiffs' argument—which is in essence a challenge to the constitutionality of

the treaty and statutory provisions that govern the immunities of the U.N. and its employees.[1]

Plaintiffs' constitutional challenge is meritless. Fundamentally, their argument conflates various procedural rights guaranteed by the Constitution with a substantive right to a remedy for the specific conduct alleged in their complaint. The latter is nowhere found in the Constitution. *See Christensen v. Ward*, 916 F.2d 1462, 1472 (10th Cir. 1990) (reprinting district court decision adopted by the circuit court, rejecting similar constitutional challenge to sovereign immunity and official immunity defenses raised by federal defendants: "The Constitution does not create a fundamental right to pursue specific tort actions."); *see generally Bowman v. Niagara Mach. and Tool Works, Inc.*, 832 F.2d 1052, 1054 (7th Cir. 1987) ("The concept of constitutionally protected access to courts revolves around whether an individual is able to make use of the courts' processes to vindicate such rights as he may have, as opposed to the extent to which rights actually are extended to protect or compensate him.").

The immunities of governmental entities and officials of various kinds have been accepted as part of U.S. law since the founding. *See, e.g., Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793) (noting immunity of the United States); An Act for the Punishment of certain Crimes against the

[1] As stated in our October 2, 2007 letter, the United States is not taking a position on the applicability of official-acts immunity to any of the allegations in this case. We write only to defend the constitutionality of the immunities afforded to the U.N. and its officials as a general matter.

United States, § 25, 1 Stat. 112, 117-18 (1790) (granting absolute immunity to diplomats). While plaintiffs are correct that dismissal of their case on immunity grounds would leave them without a remedy in court, this consequence is an unremarkable, indeed wholly intended, consequence of immunity, the very function of which is to shield against the burdens of litigation where it applies, regardless of the merits of the case. *Cf., e.g., United States v. Bein*, 214 F.3d 408, 413 (3rd Cir. 2000) ("[A]pplication of sovereign immunity, by its very nature, will leave a person wronged by Government conduct without recourse."). If this consequence were sufficient to give rise to a constitutional violation, then no form of immunity would be constitutionally permissible –an absurd result given that concepts of immunity are well-established fixtures of our law and essential, in particular, for the conduct of international relations. *See Dostal v. Haig*, 652 F.2d 173, 176 (D.C. Cir. 1981) ("If our plaintiffs are right, it would seem that the due process clause is violated by the immunity enjoyed by foreign diplomats within the United States; where a foreign diplomat has been immune from suit even though, for example, he kills or injures a U.S. citizen while recklessly driving a car. Similarly the due process clause would prevent U.S. diplomats abroad from claiming immunities in foreign courts. The answer of course is that due process is not infringed by the proper enjoyment of immunities derived from lawful sources even if thereby a claimant is frustrated in prosecuting a lawful claim."); *see also Mistretta v. United States*, 488 U.S. 361, 401 (1988) ("[T]raditional ways of conducting government . . . give

meaning to the Constitution.") (internal quotation marks omitted); *accord The Pocket Veto Case*, 279 U.S. 655, 689 (1929).

Despite plaintiffs' portrayal of their constitutional arguments as novel, see Pls.' Mem. at 4, courts have specifically rejected such arguments before with respect to the immunities pertaining to international organizations. *See Weinstock v. Asian Development Bank*, 05 Civ. 174 (RMC), 2005 WL 1902858, *3 (D.D.C. Jul. 13, 2005) (rejecting constitutional challenges to immunity afforded to international organizations under the International Organizations Immunities Act ("IOIA"), 28 U.S.C. 288b); *Ahmed v. Hoque*, 01 Civ. 7224 (DLC), 2002 WL 1964806, *7 (S.D.N.Y. Aug. 23, 2002) (rejecting constitutional challenge to diplomatic immunity invoked by foreign minister to the U.N.). As the court explained in *Weinstock*:

> It is axiomatic that Congress can limit the jurisdiction of the lower federal courts. *E.g.*, *Keene Corp. v. United States*, 508 U.S. 200, 207 (1993) ("Congress has the constitutional authority to define the jurisdiction of the lower federal courts . . . ."). One method by which it can do so, and which it employs quite frequently, is to provide by statute that the United States, foreign sovereigns, or certain entities are immune from suit in the district courts. The codification of these immunities is not a constitutional violation.

2005 WL 1902858, at *3 (some citations omitted). By the same token, there is nothing unconstitutional about such immunities being codified by treaty, as are the immunities of the U.N. and its

officials, as well as other foreign officials, such as diplomats and consular officers. *See Ahmed*, 2002 WL 19648806, at *7. Indeed, the immunities of the U.N. and its officials have repeatedly been recognized and respected by this Court over many years, without their constitutionality ever having been called into question. *See, e.g.*, *Van Aggelen v. United Nations*, 06 Civ. 8240 (LBS), 2007 WL 1121744 (S.D.N.Y. Apr. 12,2007); *D'Cruz v. Annan*, 05 Civ. 8918, 2005 WL 3527153 (S.D.N.Y. Dec. 22, 2005), *aff'd*, 223 Fed. Appx. 42 (2d Cir. 2007); *McGehee v. Albright*, 210 F. Supp. 2d 210, 218 (S.D.N.Y. 1999), *aff'd*, 208 F.3d 203 (2d Cir.2000); *Askir v. Boutros-Ghali*, 933 F.Supp. 368 (S.D.N.Y. 1996); *De Luca v. United Nations Org.*, 841 F. Supp. 531 (S.D.N.Y.), *aff'd*, 41 F.3d 1502 (2d Cir. 1994); *Klyumel v. United Nations*, 92 Civ. 4231, 1993 WL 42708 (S.D.N.Y. Feb. 17, 1993); *Boimah v. United Nations Gen. Assembly*, 664 F. Supp. 69, 71 (E.D.N.Y. 1987).

Accordingly, this Court should reject plaintiffs' contention that the immunities afforded to the U.N. and its employees under treaty and statutory law violate the U.S. Constitution.[2] I thank the

[2] In addition to challenging the constitutionality of the immunities of the U.N. and its officials, plaintiffs also contend that these immunities violate Article 2 of the International Covenant on Civil and Political Rights ("ICCPR"), *done* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force for the United States Sep. 8, 1992), by depriving them of an effective remedy for their claims. Putting aside that Article 2 does not require remedies of a judicial form, *see* ICCPR art. 2, the ICCPR in any event is not self-executing and thus does not by itself provide the basis for a private cause of action. *See Flores v. Southern Peru Copper Corp.*, 414 F.3d 233, 257-58 (2d Cir. 2003).

Court for its consideration of this submission and respectfully request that it be docketed and made part of the record in this matter.

Respectfully,

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